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IN THE

# Supreme Court of the United States

LINDA W., ERIK W., STEVEN V.D., on their own behalf and as next friends of RYAN V.D., a minor,

*Petitioners,*

*v.*

INDIANA DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF SCHOOL CITY OF MISHAWAKA and MISHAWAKA-PENN-HARRIS-MADISON JOINT SERVICES,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I. WHEN A SCHOOL DISTRICT COULD HAVE, BUT FAILED TO, PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION ("FAPE") IN THE LEAST RESTRICTIVE ENVIRONMENT TO A STUDENT ELIGIBLE FOR SPECIAL EDUCATION SERVICES UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 20 U.S.C. § 1400 *et seq.* ("IDEA"), ARE PARENTS ELIGIBLE FOR REIMBURSEMENT OF THEIR EXPENSES IN SECURING A MORE RESTRICTIVE BUT OTHERWISE APPROPRIATE UNILATERAL PLACEMENT DURING THE PENDENCY OF DUE PROCESS PROCEEDINGS, UNTIL SUCH TIME AS THE SCHOOL DISTRICT IN FACT PROVIDES FAPE?

II. ONCE A SCHOOL DISTRICT FAILS TO PROVIDE FAPE, ARE PARENTS ELIGIBLE FOR REIMBURSEMENT OF A UNILATERAL PLACEMENT IF THEY SHOW THAT THE PLACEMENT WAS REASONABLY CALCULATED TO CONFER AN EDUCATIONAL BENEFIT, WITHOUT SHOWING THAT THE STUDENT WOULD SUFFER IRREPARABLE HARM UNLESS PLACED UNILATERALLY, AND WITHOUT SHOWING THAT THE UNILATERAL PLACEMENT IS THE ONLY PLACEMENT FOR THEIR CHILD?

III. UNDER IDEA, WHEN PARENTS ARE SUCCESSFUL IN OBTAINING SUBSTANTIALLY MORE THAN ZERO RELIEF IN DUE PROCESS PROCEEDINGS, EVEN THOUGH THEY ULTIMATELY DO NOT OBTAIN ALL OF THE RELIEF THEY SEEK, ARE THEY PREVAILING PARTIES ENTITLED TO SOME AWARD OF ATTORNEY'S FEES?

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Petitioners Linda W., Erik W., Steven V.D. and Ryan V.D., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported *Linda W. v. Indiana Department of Education*, 200 F.3d 504 (7th Cir. 1999) (App. A). The District Court opinions from the Northern District of Indiana are dated October 22, 1998 (App. C); October 20, 1998 (App. B); April 22, 1998 (App. E); April 21, 1998 (App. D); March 31, 1998 (App. G); March 30, 1998 (App. F); May 1, 1997 (App. H); March 27, 1996 *Linda W. v. Indiana Department of Education*, 927 F. Supp. 303 (N.D. Ind. 1996) (App. I). The unpublished administrative decisions are dated July 7, 1997 (App. J); June 8, 1994 (App. K); March 8, 1994 (App. L); and November 30 1993 (App. M).

## STATEMENT OF JURISDICTION

The final judgment of the United States Court of Appeals for the Seventh Circuit affirming the decision of the District Court of the Northern District of Indiana was entered on December 22, 1999. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331 arising under the Individuals With Disabilities Education Act, 20 U.S.C. § 1400 *et seq*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). On March 8, 2000, Petitioners were granted until May 20, 2000 to file their Petition for Certiorari (Application No. 99 A 724). This Petition for Certiorari is timely filed on May 22, 2000.

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

(See Appendix at App. N)

## STATEMENT OF THE CASE

This is a special education case brought by Petitioners parents Linda W., Eric W. and Steven V.D. and the student Ryan V.D. under The Individuals With Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA"), seeking reimbursement for a unilateral placement and attorney's fees and costs. On the issue of reimbursement, there is no dispute here that the school district failed to provide a free appropriate public education ("FAPE") to Ryan V.D., nor is there any dispute that Ryan's individualized needs were met by the unilateral placement. The only dispute is what other tests parents must meet to be eligible for reimbursement of a unilateral special education placement. On the issue of attorney's fees and costs, the issue is simply how much relief parents must obtain to be prevailing parties entitled to an award of fees under IDEA.

### A. Educational History

Ryan V.D. is a dyslexic student who has been eligible for special education and related services under IDEA since 1990 (Fourth Grade). His teacher first referred him for special education in 1989, but Mishawaka City Schools placed him on a waiting list. His parents secured evaluations and provided them to the School District in order to establish his eligibility in 1990. From 1990 to 1992, Ryan received resource services from the School District, but was not taught to read, despite his average or above average intelligence. Petitioners repeatedly went to the School District to raise concerns and provided private tutoring and many hours of out of school assistance reading his textbooks to him and helping him do his school work.

In Ryan's seventh grade year (1992-93), the School District made a decision at the corporate level to drop "pull-out" special education services and focus on inclusion, or mainstreaming special education students. The School District passed Ryan through the regular classes by reading textbooks to him and giving him reduced assignments, instead of teaching him to read independently. Ryan's needs were forced to fit into an inclusion program which was not

tailored to his individual needs. Parents continued to provide tutoring and to spend an inordinate amount of time at home working with Ryan because he could not read.

Frustrated with the School District's unresponsiveness to their on-going concerns about the inadequacy of the District's program, by the end of December 1992, Parents obtained an independent learning disabilities evaluation from Vivian Liese. This independent evaluator carefully delineated Ryan's learning disabilities, focused on his individual needs, the reasons why he could not read, and his need for intensive direct special education instruction. Although Ryan's IQ was average and he scored in the 10th grade level in some knowledge areas, he scored at second grade level in reading, specifically decoding, word-attack skills, phonetic analysis; and at the third grade level in other reading skills. Parents investigated appropriate services, specifically designed to teach a junior high student to read, skills normally taught in primary grades. Parents obtained information about an intensive remedial summer reading program for disabled students like Ryan at Landmark School in Massachusetts. Vivian Liese recommended Landmark School as one program that could begin the intensive remediation necessary to teach Ryan to read. Mishawaka Schools had no such program. The School District did not provide summer programs for learning disabled students.

In March 1993, parents gave the School District a copy of the independent evaluation by Vivian Liese and information about the Landmark School remedial summer program. Parents requested that the School District consider and pay for the 1993 summer remedial reading program at Landmark, and then convene a conference with the Landmark teachers to review Ryan's performance and progress at Landmark School in order for the School District to continue the remedial reading instruction across all subject areas when Ryan began Eighth Grade in the School District in August, 1993. The School District said a case conference was the vehicle for consideration of parents' request and convened one on April 19, 1993. Parents

also brought to the conference an April 5, 1993 report of preliminary testing from Landmark School identifying Ryan's severe deficits and recommending a remedial program across all subject areas.

The School District participants left the April 1993 conference without considering as a team parents' independent evaluation, the Landmark School testing or parents' request for the summer remedial reading program. Instead, the School District wrote an IEP for Ryan's 1993-94 Eighth Grade year which did not address the independent evaluation and was not individualized for Ryan. Parents disagreed with the IEP and the continued inappropriate School District services. They placed Ryan in the Landmark School summer remedial reading program in June 1993. On August 18, 1993, they filed their due process hearing request after the School District failed to confer with Ryan's teachers at Landmark, failed to review and consider Ryan's program and progress at Landmark, failed to review and consider the independent evaluations, and failed to make any changes in the 1993-94 IEP/program which parents believed was inappropriate.

In their first Hearing request, parents were not seeking placement at Landmark School for the 1993-94 school year because they wanted their son at home. They wanted the School District to promptly provide an individualized, intensive remedial reading program addressing Ryan's needs in all his courses and all his deficit areas. Ryan had only one more year before high school in which to learn to read, in which to continue the progress begun at Landmark in the summer of 1993.

Parents' hearing request listed the following issues: dispute between the parties relative to the district's IEP/special education services for Ryan and violations of the child's and parents' rights. Before Ryan left Landmark School at the end of summer 1993, his Landmark School teachers developed a draft IEP personalized for Ryan for the 1993-94 school year which provided individualized goals, objectives and remediation for

Ryan, building on his progress in the intensive remedial program at Landmark School in summer 1993. Parents brought this draft IEP to the School District and requested that the School District review this input and develop a similar IEP/individualized program for Ryan at Mishawaka so the remediation finally begun for Ryan could continue. The School District refused even to review or consider the Landmark School reports, or even to confer with Ryan's Landmark teachers.

**B. The Anderson Hearing — Hearing I**

At this Hearing, parents asked the Hearing Officer to find the district's IEP/program deficient, to consider the appropriateness of the Landmark School summer 1993 remedial reading program, award parents the summer Landmark School costs as compensatory services, and award parents any other reimbursement the Hearing Officer deemed appropriate[1]. Hearing Officer Anderson found that the School District's IEP and placement did not adequately address the child's severe reading deficits in order to allow Ryan to attain reasonable self-sufficiency (App. M, 106a, citing *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 200 n.23 (1982). "The U.S. Supreme Court", in discussing what "minimal benefit must be provided to handicapped children, notes that it was the intent of Congress that handicapped children reach a reasonable degree of self-sufficiency."

Since reading affects all academic content areas, Hearing Officer Anderson concluded that it was doubtful that anything short of an intensive, systematic, sequential presentation would be of significant benefit to the child. *Id.* The Hearing Officer failed to consider the appropriateness of the 1993 summer Landmark School program for which parents sought reimbursement as compensatory services. Evidence and

1. Prior to the Hearing, the School District asked parents to list all the expenses they had incurred for Ryan's education. Parents provided same and asked the Hearing Officer to award whatever expenses she felt appropriate based on the evidence. Ryan's inadequate program, not the reimbursement, was the impetus behind the Hearing.

testimony of the appropriateness of the Landmark School was ignored but also unchallenged. The Hearing Officer did not explain why the 1993 summer remedial services at Landmark could not be considered compensatory summer services. Instead, she ordered two future summers as compensatory education for Ryan (App. M, 110a-111a).

Hearing Officer Anderson found that the School District's IEP was inadequate, found evaluations to be late and found that the School District denied Ryan a "free appropriate public education":

> *After receiving four years of hodge-podge or various interventions, accommodations and short-term or intermittent strategies, the child continues to have severe reading problems which cast doubt on the child's opportunity to have the minimal degree of personal independence intended by Congress.*

(App. M, 106a). She thus ordered the School District to reimburse parents for independent evaluations, private tutoring, and two summers of compensatory services for the violations stretching back four years before the Hearing. Hearing Officer Anderson ordered the School District to provide an intense, systematic, sequential reading program and ordered other significant changes in all of his program and all classes[2].

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2. Hearing Officer Anderson ordered:

O1.1 The respondents are ordered to provide the child with an intense, systematic, sequential remedial reading program in the methodology of their choice. These services are to be delivered in a minimum of three 45-minute sessions per week.

O1.2 The respondents are ordered to implement all accommodations necessary to the child's inclusion classes. These include, but are not limited to reading or taping texts for the child. The respondents shall

(Cont'd)

(Cont'd)

further develop and implement a plan for teaching the child organizational and study skills and accommodation strategies such as outlining and highlighting so that he will not be chronically dependent on staff and family for this assistance. These services shall be delivered in a minimum of two 45-minute sessions per week. The child's regular schoolwork shall be incorporated into this instruction whenever possible.

O1.3 The child's homework shall be adapted to require minimal parental assistance.

O1.4 The child shall be provided with a Franklin speller or similar device to assist him with his spelling. The respondents shall also provide the child a copy of each textbook that may be highlighted or marked in.

O1.5 The respondents shall continue the remedial reading and independent learning skills training programs during the summers of 1994 and 1995 as compensatory education for the special education opportunity denied him as a result of their delay in testing and convening a case conference for him. Summer services are to be provided at the rate of 3 hours and 45 minutes per week for the number of weeks equivalent to one half semester each summer.

O1.6 The respondents shall submit a copy of their plan for complying with the above orders to the Division of Special Education for compliance monitoring.

O3.1 The respondents shall reimburse the petitioners for the amounts they expended on the child's evaluations in January and March 1990.

O3.2 The respondents shall reimburse the petitioners for the amount they have expended on tutoring services since the beginning of the 1993-1994 school years.

App. M, 110a-111a.

Hearing Officer Anderson ordered the School District to implement the orders within 30 calendar days of November 30, 1993[3]. *Id.* She also cited the Indiana Regulations , which required that any appeal be filed no later than 30 calendar days after the decision was rendered. (App. M, 110a-111a). At no time during the 30 days it had to pay the parents and to develop and implement the intensive, systematic new program for Ryan, did the School District take any steps to comply with the hearing orders, to convene a case conference to review the Landmark School summer reports from Ryan's reading program and progress there in the summer of 1993, or to develop the intensive new program for Ryan which was to be in place no later than 30 days after the date the hearing order was issued.

On December 30, 1993, parents timely filed their petition for review on the limited issue of the Hearing Officer's refusal to consider Ryan's placement at Landmark School in the summer of 1993 as compensatory services when she had found him entitled to two summers of compensatory services, and to

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3. 511 IAC 7-15-5(u) includes mandatory language:

> Any party involved shall have thirty (30) calendar days from the date the hearing officer's written decision is received to:
>
> (1) implement the order(s) in the hearing decision; or
>
> (2) initiate an appeal as described in Section 6 of this rule.

Section 6(e) of the rule requires that a petition for appeal shall be:

> (1) in writing; . . .
>
> . . . . .
>
> (4) filed within thirty (30) calendar days of the date the hearing officer's decision is received by the party.

correct some factual errors. The School District failed to file an appeal within 30 days but, instead, asked the State Board of Education of Indiana to waive the statute of limitations and give them an additional 31 days to file their appeal, to January 31, 1994, a date after the final appeal decision was due. 34 C.F.R. § 300.511; 511 IAC 7-15-6(j).

Ryan, then, was left to languish his fifth year without an intensive comprehensive program, in an inadequate program/ IEP that violated IDEA and justified parents' rejection. The 1993-94 IEP had been found to deny Ryan FAPE, he then was already half-way through the school year on this IEP. This was the last year before high school and he was reading at least four years below grade level[4], when he had average or better intelligence. Any benefits of the remedial reading program started by Landmark School in summer of 1993 were in jeopardy because the School District refused to confer with Landmark School teachers in order to continue such a program for Ryan in Mishawaka, or to timely implement the Hearing Officer's Orders.

Based on the Hearing Officer's unequivocal finding of denial of FAPE, the long-standing violations by the School District extending over four years, on the School District's failure to comply with the hearing orders, and the rapidly diminishing window of opportunity in which to teach Ryan the basic reading skills he need to become self-sufficient, parents informed the School District that they were placing Ryan at Landmark School and seeking reimbursement under *School Committee of the Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1995).

On January 31, 1994, over sixty days after the Hearing Decision was issued and after the Appeal Decision was already due, the School District filed their late appeal of the 15 adverse findings against the School District.

4. Some of his skills were at the second grade level, six years below his grade placement.

In January 1994, Landmark School asked the School District to participate in reviewing and updating Ryan's IEP with his parents, teachers and the independent evaluator. The School District refused. The School District continued its 1993-94 IEP which had just been found by Hearing Officer Anderson to be inappropriate and to constitute a denial of FAPE.

### C. The First Administrative Appeal

The Appeals Board issued its decision in March 1994, well after the January 30, 1994 timeline required by IDEA. 34 C.F.R. § 300.511; 511 IAC 7-15-6(j). (App. L). The Appeals Board affirmed the Hearing Officer's orders in favor of parents on the award of the costs of the independent evaluations, the private tutoring, the denial of FAPE and the two additional summers of compensatory services, and added more findings adverse to the School District. The Appeals Board, however, refused to consider the Landmark School summer issue or the unilateral placement at Landmark made during the pending proceedings, and would not consider *Burlington*. In refusing to consider the appropriateness of the private placement, one Appeals Board member stated "I have to deal with the public school, I can't deal with Landmark . . . " Parents now had refusals by both a Hearing Officer and an Appeals Board to rule on the appropriateness of the private placement, one of the crucial elements under *Burlington* when parents seek reimbursement of a unilateral placement. Parents were told to file a new Hearing request on the reimbursement of their unilateral placement. They did so.

### D. The Woods Hearing — Hearing II

The sole issue at the second administrative hearing was whether parents were entitled to reimbursement of their unilateral placement during the administrative proceedings, pursuant to *Burlington*, after the School District refused to timely comply with the Hearing orders. Hearing Officer Woods first

dismissed the Hearing, but then reinstated. Hearing Officer Woods rejected the United States Supreme Court standard in *Burlington* and instead added an "irreparable harm" test, ruling:

> *Entitlement to reimbursement by Mishawaka to the parents by virtue of their unilateral decision to place [Ryan] in a private educational facility requires evidence that the current [School District] placement is inappropriate and, therefore, could cause irreparable harm to the student.*

(App. K, 78a).

The final orders of Hearing Officer Anderson and the Appeals Board, which were not appealed by the School District, clearly and finally established that the District's IEP and placement were inappropriate and denied Ryan FAPE. The next step in determining entitlement to reimbursement under *Burlington* required examination of the appropriateness of the Landmark School Program, not the impossible arbitrary burden of proof of "irreparable harm". Hearing Officer Woods did not provide any authority for overriding and modifying the Supreme Court's *Burlington* test. On June 8, 1994, Hearing Officer Woods denied reimbursement to parents for the unilateral placement at Landmark School, finding parents did not prove "irreparable harm" to Ryan[5].

## E. The Second Appeal

Parents appealed Hearing Officer Wood's decision to substitute proof of "irreparable harm" for the second prong of the Supreme Court's *Burlington* test. The Appeals Board decided to just uphold the second hearing decision (Woods) in total, stating "*that would appear to be cool*", thereby rubber-stamping the new irreparable harm standard. (App. J).

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5. This is despite the fact that Ryan, with average or higher intelligence, was preparing to enter high school with a second grade reading level.

## F. The District Court Proceedings

On March 29, 1994 Parents filed a two-count complaint asking the Court to apply the *Burlington* test to Ryan's placement at Landmark School (Count I) and claiming attorney's fees and costs as the prevailing party in the Anderson Hearing and Appeal I, based on the award of money for the independent evaluations, private tutoring, as well as the two summers of compensatory services, and the new comprehensive program ordered as a result of the finding that the School District's IEP denied FAPE and the order for an intensive individualized program for Ryan[6]. These awards were all final and binding; none were appealed to the District Court by the School District; none were ever reversed by the District Court.

Having failed in its attempts to overturn the Hearing and Appeal orders, the School District next embarked on a novel plan to neutralize parents' victory. The School District tried to deny all responsibility for Ryan by claiming in the District Court that Ryan was not even the School District's responsibility, that he was not a resident of the School District, *retroactively*, since 1991.[7] This action by the School District waylaid the litigation for nearly two years. Meanwhile, the School District did not provide a program for Ryan. Finally, on March 27, 1996, three years after the dispute began, the District Court ruled in Ryan's favor that the School District was responsible for Ryan. *Linda W. v. Indiana Department of Education*, 927 F. Supp. 303 (N.D. Ind. 1996) (App. I). Parents thereby preserved their award against the School District.

Since the School District had not appealed any of the adverse orders issued against it, the only issues before the

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6. Parents were forced to place Ryan unilaterally only because the School District failed to implement hearing officer Anderson's orders.

7. The Indiana Department of Education joined Misawaha in this ultimately futile attempt to deny services to Ryan.

District Court once it denied the School District's denial of residency to Ryan, were parents' issues, namely (1) the proper application of the *Burlington* test to parents' private placement specifically, whether parents had to prove irreparable harm under *Burlington*; and (2) attorney's fees and costs based on the parents prevailing party status in the underlying administrative proceedings before Anderson, as affirmed by the Appeals Board.

The District Court agreed that Ryan was not receiving FAPE from the School District at the time parents withdrew him from the public school system (App. H, 37a-38a). The District Court also agreed that parents were entitled to seek an appropriate education for Ryan during the pendency of the administrative appeal (App. H, 39a). But because parents withdrew Ryan after the Level I hearing officer had identified the changes necessary to make the public school program appropriate, the District Court found that parents were entitled only to reimbursement up to the amount parents would have incurred to hire private tutors to provide the services Hearing Officer Anderson described (App. H, 39a-40a).

The District Court's finding is based on its theory that only "a directive that Landmark was the only placement for Ryan, . . . obligat[es] the school defendants to pay for his placement there" (App. H, 43a).

The District Court failed to consider whether Landmark School conferred an educational benefit on Ryan[8].

The District Court further limited parents' reimbursement in time, holding that an offer from the School District to convene

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8. The District Court failed to note that parents had already been providing private tutoring for some time. Moreover, the hearing officer's order envisioned a more across the board systemic approach than could be provided by a private tutor after school. Parents simply are not in a position to unilaterally implement a intensive comprehensive in-school program such as Anderson ordered.

a staffing to implement the hearing officer's orders, some two and a half months after Ryan had been placed at Landmark School, extinguished parents' right to further reimbursement (App. H, 40a). But there was in fact, no IEP prepared by the School District, and the School District wrote to parents that Ryan would have to be returned from Landmark first. In fact, Linda W. went to the School District in March, 1994 to discuss a program and was told none was available, that he would have the same program he had before the Hearing. Given the School District's previous failings, and its inability to put any program in place until Ryan returned from Landmark School, parents reasonably refused to interrupt Ryan's education mid-stream to see if the School District could put something together.

As to attorney's fees and costs, the District Court concluded that parents were not prevailing parties because "*neither Ms. Anderson nor the Court found that the school was unable to provide Ryan with an appropriate education*" (App. H, 43a). The District Court concluded that parents failed "*to achieve what they sought — a directive that Landmark was the only placement for Ryan, thus obligating the school defendants to pay for his placement there*" (*Id.*). The District Court failed to consider the relief awarded parents in determining party status.

The District Courts did add an additional money award to the relief already won by parents.

## G. The United States Court Of Appeals For The Seventh Circuit Proceedings

The Seventh Circuit denied parents' claim for reimbursement of Landmark School costs, finding:

> *What matters now is that at the end of the administrative process, state officials concluded that education in the public schools, plus five special*

> *sessions per week, plus supplemental education during the summers of 1994 and 1995, would provide Ryan with a free appropriate public education.*

(App. A, 2a)

Although the Seventh Circuit noted that the School District was not providing FAPE when Ryan was placed unilaterally, the Court held that the District Court appropriately denied reimbursement because the School District could provide an appropriate education once suitable adjustments were made to the program (App. A, 4a). The Seventh Circuit concluded that a public school placement met IDEA's least restrictive environment mandate, and that Ryan did not "need" Landmark School (App. A, 5a).

As to attorney's fees and costs, the Seventh Circuit found that parents did no more that "score tactical victories in interlocutory skirmishes" (App. A, 6a). Thus, parents were not prevailing parties entitled to fees.

## REASONS FOR GRANTING THE WRIT

### I. THE PETITION SHOULD BE GRANTED BECAUSE OTHER U.S. COURTS OF APPEALS HAVE ENTERED DECISIONS IN CONFLICT WITH THE DECISION BELOW WITH RESPECT TO WHETHER UNILATERAL PARENT PLACEMENTS MUST BE IN THE LEAST RESTRICTIVE ENVIRONMENT.

This Court has held that "when a public school system has defaulted on its obligation under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits.' " *Florence County School District Four v. Carter*, 950 F.2d 162 (1991), quoting *Board of Ed. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982).

In the present case the School District failed to provide FAPE. But before examining whether the unilateral placement conferred educational benefit, the Seventh Circuit added a "least restrictive" test for private school placements. Thus, the Seventh Circuit justified denying reimbursement for the unilateral placement because it was not "least restrictive", finding that IDEA favors mainstreaming (App. A). The Seventh Circuit held that there was a less restrictive alternative: the program designed by Hearing Officer Anderson. However, the School District had failed to implement that program, and further belatedly appealed Anderson's decision while Ryan started his last semester of junior high school. Nevertheless, the Seventh Circuit concluded that the District Court properly exercised its discretion to deny reimbursement because "[a]ll three participants — the school district, the hearing officer, and the Board — believed that Mishawaka's public schools could provide Ryan with an appropriate education once suitable adjustments had been made to the program" (App. A, 4a)[9].

The Fifth Circuit similarly consistently bars parents' right to reimbursement of private placements because such placements are not in the least restrictive environment. The Fifth Circuit recently upheld a district court decision denying parents reimbursement of a unilateral placement because it was not least restrictive; that parents should have tried less restrictive programs, which were never identified, offered or recommended by the school district. *Sylvie M. v. Board of Education of Dripping Springs Independent School District*, 48 F. Supp. 2d

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9. Of course, parents always believed the School District *could* provide Ryan an appropriate program, witness their on-going requests for years that the School District provide him FAPE. In fact, that is why they started the remediation at Landmark in summer of 1993 and brought Ryan back to Mishawaka asking the School District to continue an individualized program for the 1993-94 school year. The problem was the School District refused to provide the services, and then interpreted the Anderson-ordered program as a continuation of the same deficient program he was already receiving at the School District.

681 (affirmed 5th Cir. unpublished opinion 2000). The school district had failed to identify Sylvie as seriously emotionally disturbed under IDEA, until *after* parents placed her unilaterally. Instead, while in the district, the school district had her sign a contract not to commit suicide without calling the school first, and actually reduced her services on her IEP, and she ran away after repeated school problems. The Fifth Circuit's emphasis on "least restrictive" effectively bars parents from reimbursement of unilateral placements. *Flour Bluff I.S.D. v. Katherine M.*, 91 F.3d 689, 691 (5th Cir. 1996), *cert. denied*, 522 U.S. 1047, 118 S. Ct. 690 (1998). Requiring parents to comply with "least restrictive" in unilateral placements effectively bars their right to reimbursement under *Burlington*.

In contrast to the Fifth and Seventh Circuits, the Sixth Circuit addressed the complaint of school districts, that for a private placement to be "proper under the Act" (IDEA) it must fulfill the "least restrictive"/mainstreaming requirement. *Cleveland Heights University Heights City School District v. Boss*, 144 F.3d 391 (6th Cir. 1998). The school district in *Boss* wanted the court to read IDEA to say:

> *If we fail to provide a disabled child with an appropriate education, the parents must pay for a private education, or let their child languish in our institution if the only placement more suitable to her needs and more closely approximating the ideal envisioned by the IDEA than what we offer is a specialized private school that admits only learning disabled students.*

(*Id.*).

The Sixth Circuit concluded that Congress did not intend to place beneficiaries of IDEA in the position of having to choose only among these unpalatable alternatives and held that the failure of the private school to satisfy IDEA's mainstreaming requirement does not bar parents from receiving reimbursement for expenses associated with the unilateral placement (*Id.*).

"Least restrictive" or "mainstreaming" options may be readily accessible to school districts who must have a full continuum of placements available under IDEA. Parents, however, are disadvantaged because they cannot create a "continuum of least restrictive" alternatives or force some other public school district to accept their child in order to secure a placement less restrictive than a private school.

In the Sixth Circuit, then "conferring educational benefit" is the test of appropriateness of the private placement[10]. To the contrary, in the Fifth Circuit, the least restrictive/mainstreaming requirement cannot be waived and trumps educational benefit. In the Seventh Circuit according to *Linda W.*, parents must prove irreparable harm, and even then the private placement will be assessed in terms of the mainstreaming requirement if there is a "potential" less restrictive placement possibility, whether or not such placement has even been offered or is even available[11].

The rights of disabled children and their parents vary significantly with respect to private placements, depending on the Circuit in which they reside. This Court should decide whether parents are barred from obtaining reimbursement for private placements merely because the private placement does not conform to the mainstreaming requirement of IDEA.

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10. This test is consistent with *Burlington* and *Carter*.

11. In *Linda W.*, the District Court and Seventh Circuit expected parents to keep Ryan in the "status quo" inappropriate School District placement (to which they were already adding private tutoring and 16-20 hours a week of additional assistance) and add five *more* private sessions a week, as though adding more after-school service on their part would transform the District's inappropriate program into FAPE.

## II. THE PETITION SHOULD BE GRANTED BECAUSE THE SEVENTH CIRCUIT OPINION CONFLICTS WITH THIS COURT'S PRIOR RULINGS REGARDING WHEN REIMBURSEMENT FOR A UNILATERAL PLACEMENT IS APPROPRIATE UNDER IDEA.

As a condition for the receipt of federal funds each disabled child must be provided FAPE in conformance with a Individualized Education Program ("IEP") that provides personalized instruction individually designed to meet the disabled child's unique needs in order to achieve self-sufficiency. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), this Court established the standard for FAPE:

> *(1) Has the school district complied with the provisions set forth in IDEA?*
>
> *(2) Is the IEP reasonably calculated to enable the child to receive educational benefit that is, will it allow the disabled child to reach the reasonable degree of self-sufficiency intended by Congress?*[12]

In all the proceedings in *Linda W.*, the School District's IEP was determined to be flawed and to deny Ryan FAPE. This determination was stated unequivocally by Hearing Officer Anderson in November 1993 and was never overturned by the Appeals Board, the District Court or the Seventh Circuit. Based on the denial of FAPE, Hearing Officer Anderson's finding that the School District's violations of IDEA tracked back four years prior to the 1993 Hearing request, and by the District's refusal to comply with the Hearing Orders, parents decided that Ryan could no longer continue in such an inadequate program. The Hearing Officer found the District's program inadequate *even*

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12. This *Rowley* test was cited by Anderson in her ruling that the School District violated IDEA and denied Ryan V.D. FAPE.

with the additional private tutoring parents were providing and the 16-20 hours they spent each week helping Ryan with his homework because he could not read. Landmark School provided an intensive comprehensive program for learning disabled students like Ryan, which combined all the components Anderson ordered. In making a unilateral placement during the pendency of the proceedings, Parents expected to be bound by this Court's two prong test in *Burlington*, namely,

> *(1) Was the District's IEP appropriate?*
>
> *(2) Was the parent-secured placement appropriate? School Committee of the Town of Burlington v. Department of Education of Massachusetts, 471 U.S. 359 (1995)*

This Court could have but did not state as the first prong:

> *(1) Could the School District provide an appropriate program?*
>
> *or*
>
> *(1) Will the school district offer something that may be appropriate after the District's IEP had been found inappropriate and parents have already made the unilateral placement?*

Neither did this Court ask whether the parent-secured placement was the only placement which met the student's needs.

The after-the-fact defenses from the School District do not excuse their failure to comply with IDEA in the past.

The Seventh Circuit Court of Appeals replaced the first prong of *Burlington* with a different standard – could the School District provide Ryan with an appropriate education once suitable adjustments have been made. The Seventh Circuit further approved the District Court's finding that the unilateral

placement was reimbursable only if it "was the only placement for Ryan" (App. H, 43a). Thus, the Seventh Circuit found that Ryan did not "need" Landmark School (App. A, 5a).

In *Rose by Rose v. Chester County Intermediate Sch. Unit*, 1996 U.S. Dist. LEXIS 6105 (E.D. Pa.) a school district argued that only limited modifications were necessary to bring the IEP up to the level of "appropriate" and the school district was fully capable of implementing these changes. The court in *Rose* ordered reimbursement, stating — "a miss by a yard is as good as a miss by a mile" (*Id.*).

In contrast, in *Linda W.*, the School District's long-term misses by a mile meant only that parents should have kept adding more services to the School District's inappropriate program. The Seventh Circuit has decided this federal question in a way that conflicts with and departs so far from this Court's decision in *Burlington* and *Rowley* that the intervention by this Court is warranted.[13]

The Court below also added to *Burlington* an extra "free violation of IDEA" period for the School District. When in November 1993, Hearing Officer Anderson tracked the District's violations back four years, capped by the deficient IEP/program for 1993-94 in which Ryan was floundering at the time, and the District failed to timely implement the Hearing orders, parents could no longer wait for this School District to start to deliver

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13. Insofar as the Seventh Circuit's opinion accepts the Woods' irreparable harm test, that test, too, is in conflict with the opinion of this Court and should be addressed. The decision below is built on a house of cards; not one underlying decision properly considered this Court's ruling in *Burlington*. Once parents met the first prong of the *Burlington* test, which they did when Hearing Officer Anderson found that the District's IEP denied Ryan FAPE, the inquiry is the appropriateness of the Landmark School Program, not whether Ryan would have suffered irreparable harm if he stayed his fifth years in the District's "hodge podge" of bad programming, or whether the unilateral placement was the only placement which met his needs.

FAPE to their disabled son. They had already met the first prong of *Burlington*. They also presented uncontroverted evidence of the appropriateness of the Landmark School learning disabilities program individualized to Ryan, only to be told by Hearing Officers and Appeals Boards that they would not consider the private school and that parents must prove "irreparable harm" before they could be eligible for reimbursement of a unilateral placement during the pendency of the administrative proceedings.

Under *Burlington*, parents are not entitled to reimbursement if the courts ultimately determine that the IEP proposed by the school officials was appropriate. Significantly, in Ryan's case, no trier of fact, not even the District Court or the Seventh Circuit ever reversed the finding that the School District's April 19, 1993 IEP was inappropriate and denied Ryan a free appropriate public education. The Courts acknowledge that the IEP proposed by the District which was at issue in the Hearing and which was in place when parents moved Ryan was inappropriate. When parents moved Ryan to Landmark School in mid-January 1994, they had allowed the School District nearly a year to revise the inappropriate April 1993 IEP and to provide Ryan FAPE, including the time after Hearing Officer Anderson ordered the District to develop and have in place an appropriate program for Ryan no later than December 1993. Parents further brought a draft IEP to the District prepared by Ryan's teachers at Landmark School, but the School District refused to look at it. The Hearing Officer did not merely order a few tutoring sessions a week. She ordered an intense comprehensive special education program using grade level curriculum, which is precisely what Landmark School provided. However, the District Court's requirement that parents prove that the unilateral placement was the *only* appropriate placement denied Ryan's parents their rights under IDEA and *Burlington*.

Not one Hearing Officer, Appeals Board or court would ever apply this Court's test, would ever consider and rule on the

appropriateness of parents' unilateral placement. Nowhere in the record is there any determination that the parents-selected placement was inappropriate in that it failed to confer educational benefit and that, therefore, parents did not meet the *Burlington* standard. Rather the Hearing Officers/Appeals Board refused in the first proceeding to even consider the appropriateness of parents' placement and when forced in the second proceeding to consider only the issue of the unilateral placement, still refused to rule on the appropriateness of the Landmark School placement and, instead, made the after-the-fact ruling that parents had to prove irreparable harm as a pre-condition to a unilateral change in placement during the proceedings.

The District Court erred and the Court of Appeals followed suit when it failed to consider the School District's abysmal failure over the previous four years and thereafter, as well as its attempt to cease all services to Ryan and to foist him onto a neighboring school district, until the District Court halted that tactic at the end of 1996[14]. By that time, the proceedings had

14. Although the District Court made much of the School District's proposal for a case conference to implement the hearing officer's orders, further correspondence demonstrates that the District's proposal did not contemplate creating any program unless and until Ryan was brought back from Landmark School where he was already in the middle of the semester and where he was succeeding. There was no other placement. In fact, Linda W. had repeatedly attempted to resolve the dispute when the School District said it would provide an "appropriate program". When asked to describe how the new, appropriate program would differ from the inappropriate School District program he was already receiving, the School District responded that he would receive the same services. When Linda W. went to the School District on March 10, 1994 to discuss and view what services were available for Ryan, only the prior inappropriate program was available. The School District staff explained that the program ordered by Hearing Officer Anderson was not available, nor was it available at the High School where Ryan would enter in fall of 1994. Indeed, in its argument before the second Appeals Board *after*

(Cont'd)

extended nearly three years. Ryan is exactly a student contemplated in *Burlington* as appropriate for a unilateral placement — his IEP was found to deny him FAPE in 1993, the ponderous appeal proceedings began with the School District filing a late appeal and then litigating until the end of March three years later the issue of his residency. Without the unilateral placement, Ryan would have had no appropriate placement during this process[15].

The Woods decision, in fact, does make a passing reference to the Landmark Program, describing it as matching in substance the program ordered by Hearing Officer Anderson (App. K, 76a, 77a). It was developed pursuant to an IEP conference with Ryan's teachers, his parents and the independent evaluator Vivian Liese (*Id.*). The School District was invited to participate in the IEP but refused. Woods describes the program at Landmark as a regular 8th grade academic program with tutorial assistance, with a structured study skills development approach (*Id.*). However, once Woods recognized the match between the program the Hearing Officer ordered and the Landmark School

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(Cont'd)
it had made its "gesture", the School District actually argued that Anderson really ordered the same inappropriate program the School District was already providing. In fact, the Appeals Board faulted the School District for not developing an IEP since April 1993. In its summary judgment memorandum, the School District continued to admit that the School District was repeatedly offering substantially the same program to Ryan, the one found to deny him FAPE: "In reality, the program ordered to be implement by IHO Anderson was not substantially different from the services that were already being provided to Ryan by the School", the School District argued during the litigation. Parents could hardly be faulted for refusing to accept the same inappropriate program.

15. In August 1994, the School District focused attention not on an appropriate program for Ryan but "where he sleeps", and demanded parents document every place Ryan had slept for the past 10 years in the attack on his residency (School District Interrogatories).

IEP and program provided, he then created the "irreparable harm" test. Woods never defined "irreparable harm" and failed to cite any legal authority for the test. (App. K).

## III. THE CIRCUITS ARE SPLIT REGARDING HOW MUCH RELIEF IS NECESSARY TO ACHIEVE PREVAILING PARTY STATUS.

IDEA allows parents who prevail against school district in administrative proceedings under the Act to file a lawsuit for the attorney's fees and costs related to the proceedings. 20 U.S.C. § 1415; 34 C.F.R. § 300.513. In March 1994, having prevailed by virtue of the final unappealed portions of the Anderson/ Appeals Board decision, parents filed for attorney's fees and costs as prevailing parties in Count II of their Complaint.[16] The School District never appealed the final Appeals Board award to Ryan's parents of the costs of the independent evaluations, the private tutoring, the two summers of compensatory education, the denial of FAPE, the findings that the School District's IEP and program violated IDEA, and the orders that Ryan must be promptly provided an intensive comprehensive program. None of these orders or findings were under review by the District Court or the Seventh Circuit. All this relief was final and binding, regardless of whether the District Court ordered additional relief.

In *Linda W.* parents won the following relief against the School District:

1. Payment for Independent Evaluations:
   - awarded by Hearing Officer Anderson
   - affirmed by Appeals Board
   - unappealed by School District

16. Count I dealt with the issue of Landmark School/*Burlington* test and requested that the District Court overturn the administrative decisions refusing to consider the appropriateness of Landmark School and the "irreparable harm" standard.

2. Payment for private tutoring:
   - awarded by Hearing Officer Anderson
   - affirmed by Appeals Board
   - unappealed by School District
3. Two summers of compensatory education:
   - awarded by Hearing Officer Anderson
   - affirmed by Appeals Board
   - unappealed by School District
4. Denial of FAPE and Inappropriate IEP/ Program:
   - ordered by Hearing Officer Anderson
   - affirmed by Appeals Board
   - unappealed by School District
5. Ryan found to be a resident of the School District entitling him to services:
   - ordered by District Court in March 1996, three years after the dispute between the parties began
6. Payment of additional money
   - ordered by District Court

The School District's late appeal cited 15 orders/findings by Hearing Officer Anderson adverse to the School District, which attempted to overturn her 1993 decision on denial of FAPE and the award of money and compensatory services. They lost the administrative appeal and did not appeal their loss to District Court, choosing instead the residency attack. Therefore, parents had already prevailed well before they filed their complaint in Court. Because they had materially altered the

legal relationship between the parties *before* they filed in Court, they were already prevailing parties entitled to attorney's fees and costs before the litigation started. The Court below said parents were not prevailing parties because they "did not prevail in the litigation" because the District Court added only $1,000 to their victory. But this was $1,000 more than they had already won in the final and binding Hearing and Appeals Board decisions which the School District did not appeal and which parents did not have to appeal since the award was in their favor.

IDEA specifically allows an award of attorney's fees and costs when parents prevail in administrative proceedings. 20 U.S.C. § 1415. The Seventh Circuit erred when it ignored the prevailing party status conferred on parents through the unappealed final orders of Hearing Officer Anderson and the first Appeals Board. The award parents won was not a mere "tactical victory in interlocutory skirmishes" as the Seventh Circuit states. The award of money for independent evaluations, money for private tutoring, two summers of compensatory education and an order for a new educational program were final binding orders of administrative Hearing Officers and Appeals Boards. Nor can the School District's multi-year litigation denying Ryan's residency and entitlement to *all* services initiated after it lost the Administrative Hearing and appeal decisions be dubbed a mere "procedural victory" for it implicated his substantive rights as well. Had parents lost that battle, they would have lost all of Ryan's substantive rights to a free appropriate public education from the School District their reimbursement ordered by the Hearing Officer/Appeals Board as well as. The mere denial of additional relief under *Burlington* during the pendency of the proceedings does not overturn the relief already won in the first unappealed final administrative order. In fact, the only relief parents wanted but did not receive was reimbursement for the Landmark School remedial summer program as compensatory services

and for tuition at Landmark School during the pendency of this dispute.[17]

In a recent Tenth Circuit case remanded by this Court, the Tenth Circuit notes that "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. *Fowler v. Unified School District No. 259*, 107 F.3d 797 (10th Cir. 1997), *cert. granted and vacated*, 1175 S. Ct. 2503 (1997), citing *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). In *Fowler*, the parents actually sought reimbursement for a sign language interpreter. On remand the Tenth Circuit reversed and remanded to the district court to determine an award of some lesser amount than parents sought for the interpreter, an amount the Tenth Circuit said was "probably an amount still greater than zero." (*Id.*). Based on recovery "greater than zero" standard, the Tenth Circuit stated:

> *We therefore hold that the Fowlers are prevailing parties and we remand to the district court for a calculation of reasonable attorney's fees.*

(*Id.*)

In stark contrast, the Seventh Circuit denies parents prevailing parties status when they survive savage litigation over residency and entitlement to services, win reimbursement of independent evaluations, private tutoring, two summers of compensatory education, a decision that the School District's IEP denied the student FAPE, and partial reimbursement for a private placement, certainly an amount "greater than zero". This Court should address this conflict between the Circuits so that parents of disabled children in some states are not treated differently in their ability to obtain counsel, depending on where they reside.

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17. And, as set out above, parents are herein asking this Court for a writ of Certiorari on that issue as well.

## CONCLUSION

This case presents questions of exceptional importance regarding the rights of students entitled to special education services. Although this Court has already spoken on these matters, there remains conflict among the Circuits as to the interpretation of the statute and this Court's rulings. If the opinion below is allowed to stand, Ryan will have been denied a free appropriate public education. Moreover, other special education students will be forced to either privately pay for an appropriate placement or to wait until such time as the public school district adequately adjusts its program (if at all). This is intolerable when an education delayed is an education denied.

This Court should reaffirm the important rights of special education students to receive FAPE in a timely manner and to be compensated for attorney's fees and costs incurred in successfully litigating under IDEA.

Accordingly, Petitioners parents and Ryan respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED DECEMBER 22, 1999

LINDA W., et al.,

Plaintiffs-Appellants,

v.

INDIANA DEPARTMENT OF EDUCATION, et al.,

Defendants-Appellees.

No. 98-2276.

United States Court of Appeals, Seventh Circuit.

Argued Oct. 27, 1999.

Decided Dec. 22, 1999.

* * *

Before: BAUER, COFFEY, and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge.

Ryan Van Damme, who is dyslexic, received an individually tailored educational program at the public schools of Mishawaka, Indiana. Near the end of Ryan's seventh-grade year (in spring 1993), his parents objected to the school district's plan for the next year. During summer

*Appendix A*

1993 Ryan attended Landmark School in Massachusetts, and toward the end of that summer his parents requested a hearing on the adequacy of the district's plan. A hearing officer concluded that the district must provide Ryan with help from specialists (three 45-minute sessions per week with remedial reading instructors, two per week on "accommodation strategies") and afford compensatory education during the summers of 1994 and 1995 to make up for its late start in supplying this assistance. The hearing officer concluded, however, that Ryan was not entitled to summer education as a norm and should receive most of his instruction via "main-streaming" in the public schools. Shortly after receiving this decision, Ryan's parents removed him from the Mishawaka schools and sent him to Landmark School full time. They initiated this litigation seeking to compel Mishawaka to pay for Ryan's education at Landmark.

After concluding that Mishawaka is responsible for Ryan's education, see 927 F.Supp. 303 (N.D.Ind.1996), the district court concluded that the final decision of the administrative process was reasonable and should be enforced in the main. Local and state educational bodies provided Ryan with multiple hearings under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-87, but it is not necessary to recount all the details. What matters now is that at the end of the administrative process, state officials concluded that education in the public schools, plus five special sessions per week, plus supplemental education during the summers of 1994 and 1995, would provide Ryan with a free appropriate public education. With this conclusion the district court agreed in a thoughtful opinion. The district court accorded suitable deference to the hearing officers'

conclusions. Given the deference we owe to the district judge's assessment of the person-specific factors that these situations entail, the decision cannot be upset on appeal. Morton Community Unit School District No. 709 v. J.M., 152 F.3d 583, 587-88 (7th Cir.1998), explains why appellate review is deferential in a case of this nature even though the district court granted summary judgment; no more need be said about the standard of review or the merits of the hearing officers' educational plan for Ryan.

Nonetheless, Ryan's parents contend, they are entitled to reimbursement for the placement at Landmark because at the time they transferred Ryan from public to private school, Mishawaka was not providing him with an adequate education. Under the stay-put provision of the Act, 20 U.S.C. § 1415(e)(3) (1992 ed.), the parents' objection to the proposed 1993 plan locked in place the 1992 plan — a plan that, the hearing officers determined, had flaws similar to those of the 1993 plan. (Amendments made to the Act in 1997 alter the stay-put rules, see § 1415(j), (k)(7); we need not explore the differences.) When Ryan was transferred to Landmark in January 1994, the school district was still using the 1992 plan, because both sides had filed administrative appeals from the initial hearing officer's decision. Ryan's parents invoke Burlington School Committee v. Massachusetts Department of Education, 471 U.S. 359, 369-71, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), for the proposition that parents who remove their child from a deficient educational environment are entitled to compensation for the replacement education. Parents who act on a belief that the public education is inadequate take a risk, for, if the school's program is upheld in the end, the

parents are out of pocket; but Ryan's parents contend that the vindication of their view means that they must be reimbursed. Like the district court, we think that this overreads Burlington.

What the Court held in Burlington is that a district judge has the discretion "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP [individualized education program], is proper under the Act." 471 U.S. at 369, 105 S.Ct. 1996. Parents thus must establish more than that the school district's original plan is deficient. If that were enough, then the costs to school districts of administering the Act would skyrocket, for educational professionals frequently disagree among themselves how best to cope with a pupil's learning problems. One set of educators proposed a plan for Ryan; the first hearing officer modified the plan; the state's Board of Special Education Appeals modified the hearing officer's modifications. All three participants — the school district, the hearing officer, and the Board — believed that Mishawaka's public schools could provide Ryan with an appropriate education once suitable adjustments had been made to the program. This is a frequent sequence, and if it were enough by itself to justify moving the child to a private school (with compulsory reimbursement), then there would be an exodus from the public schools. That is not what Burlington contemplates. Parents not only must show that placement in a private school is "proper under the Act" but also must persuade a district court to exercise its discretion to provide reimbursement. The Court emphasized that discretion, which means that reimbursement is not a

matter of entitlement. "The statute directs the court to 'grant such relief as [it] determines is appropriate' [when the school district's plan is inadequate]. The ordinary meaning of these words confers broad discretion on the court." 471 U.S. at 369, 105 S.Ct. 1996 (quoting from 20 U.S.C. § 1415(e)(2), which has since been moved to § 1415(i)(2)(B)(iii)).

In this case the district court concluded that reimbursement for private education is not "appropriate", because the hearing officers and the judge believed that with extra sessions five times a week, education in the Mishawaka schools would satisfy the Act's requirements — would indeed be preferable to education at Landmark School, for the Act prefers a "mainstreaming" approach while Landmark's program separates its pupils from their non-disabled peers. The hearing officers recognized that the Mishawaka schools had fallen behind in providing extra services to Ryan and that compensatory enrichment was called for; but the hearing officers and the district court also concluded that Ryan did not need placement in Landmark either for summer sessions or for a full program. Given the discretion to which the Supreme Court referred, this reasoned (and reasonable) conclusion cannot be upset now.

One final issue remains: attorneys' fees. Ryan's parents contend that they have "prevailed" in this case and therefore are entitled to an award of fees despite the district court's unwillingness to upset the hearing officers' principal decisions. Plaintiffs recovered about $1,000 as compensation for private tutoring for Ryan in January and February 1994. On all other issues they lost, and $1,000 is paltry compared with the relief they were seeking. That implies, as the district

court held, that plaintiffs did not prevail in the litigation. See Fletcher v. Ft. Wayne, 162 F.3d 975 (7th Cir.1998); Hunger v. Leininger, 15 F.3d 664, 670 (7th Cir.1994). Plaintiffs reply that they won a procedural victory (the district court's decision that Mishawaka is responsible for Ryan's education) and that the hearing officers found the district's plan wanting. True enough, but to prevail in litigation one must win on the merits, and not just score tactical victories in interlocutory skirmishes. Hanrahan v. Hampton, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980). Plaintiffs did not need to file suit to enjoy the value of their success in the administrative process. Even the decisions of the hearing officers did Ryan no good in the end, because his parents removed him from the public schools before those decisions took effect. The district court did not abuse its discretion in holding that defendants are the prevailing parties in this litigation.

AFFIRMED.

**APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION DATED AND ENTERED OCTOBER 20, 1998**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Cause No. 3:94-CV-268RM

**Appellate No. 98-2276**

LINDA W., *et al.*,

Plaintiffs,

vs.

INDIANA DEPARTMENT OF EDUCATION, *et al.*,

Defendants.

MEMORANDUM AND ORDER

This order corrects the clerical error in the amended judgment entered in this case and addresses the plaintiffs' remaining motion for attorneys' fees and an extension of time to appeal, denying that motion in its entirety.

I. CORRECTION OF JUDGMENT

On June 8, 1998, this court requested permission from the United States Court of Appeals for the Seventh Circuit

to correct a clerical error in the judgment. The Seventh Circuit granted the court's request on August 3, remanding the case for the limited purpose of correcting the clerical mistake described in the June 8 request.

Pursuant to the Seventh Circuit's remand, the court now corrects the April 22, 1998 amended judgment pursuant to Fed. R. Civ. P. 60(a) as follows: the reference to costs contained in the last sentence is removed, so the corrected amended judgment shall read as follows:

> It is ordered and adjudged that judgment is entered for the plaintiffs on Count I, which seeks reimbursement for the placement of Ryan at Landmark School between December 30, 1993 and March 8, 1994, though the plaintiffs' recovery is limited to the value of additional remedial services that Ryan would have received under the hearing officer's order as detailed in the court's May 1, 1997 order. In all other respects, judgment is entered in favor of the defendants. Only the school defendants submitted evidence regarding the value of services as directed by the court's May 1, 1997 order; judgment is entered for the plaintiff and against the school defendants, Mishawaka-Penn-Harris-Madison Joint Services and the School City of Mishawaka, in the sum of $1,017.61.

*Appendix B*

## II. Plaintiffs' Motion for Attorneys' Fees and Extension of Time to Appeal

On May 6, 1998, the plaintiffs filed a request for attorneys' fees as prevailing parties under the Individuals with Disabilities Education Act.[1] As defendants School City of Mishawaka and the Mishawaka-Penn-Madison Joint Services Cooperative point out in their response, the court disposed of the plaintiffs' claim for attorneys' fees in its May 1, 1997 Memorandum and Order. In its order, the court granted the defendants' motions for summary judgment on Count II (the count of the amended complaint seeking attorneys' fees). *See* May 1, 1997 Memorandum and Order at 18-20 (discussion of attorneys' fees issue), 21 (Conclusion; granting summary judgment on Count II). For the reasons set forth in that order, the court denies the plaintiffs' motion for attorneys' fees.

The plaintiffs' May 6 motion also seeks an order, pursuant to Fed. R. Civ. P. 58, deeming its attorneys' fees motion to have the same effect on the time for filing a notice of appeal as a motion pursuant to Fed. R. Civ. P. 59. The plaintiffs' motion, however, is mooted by their timely filing of a Notice on Appeal on May 19. *See* Fed. R. Civ. P. 58 (Upon "timely motion for attorneys' fees . . . under Rule 54(d)(2), the court, *before a notice of appeal has been filed and has become effective*, may order that the motion have the same effect under Rule 4(a)(4) of the Federal rules of Appellate Procedure as a timely motion under Rule 59.").

---

1. The plaintiffs' attorneys' fees request does not address the court's previous rulings on the issue or otherwise appear to seek relief pursuant to Fed. R. Civ. P. 59.

*Appendix B*

## III. Conclusion

Accordingly, the court now CORRECTS the April 22, 1998 amended judgment pursuant to Fed. R. Civ. P. 60(a) as set forth in Part I of this order and DENIES the plaintiffs' motion for attorneys' fees and extension of time to appeal [docket entry 118], denying the request for attorneys' fees for the reasons set forth in the court's May 1, 1997 Memorandum and Order and denying as moot the plaintiffs' request for an extension of time to file their appeal.

SO ORDERED.

ENTERED: October 20, 1998

s/ Robert L. Miller, Jr.
Robert L. Miller, Jr., Judge
United States District Court

## APPENDIX C — CORRECTED AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA DATED OCTOBER 22, 1998

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF INDIANA**

Case No. 3:94cv268RM

LINDA W., ERIK W., STEVEN V.D. on their own behalf and as next friends of Ryan V.D., a minor

Plaintiff

v.

KEVIN MCDOWELL, Indiana

Defendants

CORRECTED AMENDED JUDGMENT
IN A CIVIL CASE

* * *

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered for the plaintiffs on Count I, which seeks reimbursement for the placement of Ryan at Landmark School between December 30, 1991 and March 9, 1994,

though the plaintiffs' recovery is limited to the value of additional remedial services that Ryan would have received under the hearing officer's order as detailed in the court's May 1, 1997 order. In all other respects, judgment is entered in favor of the defendants. Only the school defendants submitted evidence regarding the value of services as directed by the court's May 1, 1997 order; judgment is entered for the plaintiff and against the school defendants, Mishawaka-Penn-Harris-Madison Joint Services and the School City of Mishawaka, in the sum of $1,017.61.

**Equivalent Coupon Issue Yield:** 5.391%

This document entered pursuant to Rules 79(A) and 58 of the Federal Rules of Civil Procedure on:

Dated: October 22, 1998 Stephen R. Ludwig, Clerk

By: s/ [illegible]
Deputy Clerk

## APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION DATED AND ENTERED APRIL 21, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

No. 3:94-CV-268RM

LINDA W., et al.,

Plaintiffs,

vs.

INDIANA DEPARTMENT OF EDUCATION, et al.,

Defendants.

ORDER

The court's March 30 memorandum and order, which ordered the defendants to pay the plaintiffs $1,017.61 together with costs, has caused some confusion. The Indiana Department of Education has moved for clarification of that order and the plaintiffs have moved to reconsider the order to allow them to submit proof of expenses incurred in sending Ryan to Landmark School. Through this order, the court hopes to clarify its March 30 directives.

The plaintiffs contend that in the March 30 order, the court awarded them for the first time reimbursement for Ryan's placement at Landmark School and that they should

be permitted to present evidence on the amount of that expense. The plaintiffs' misunderstanding is due to the court's poor wording when it directed judgment for the plaintiffs "to the extent the plaintiffs seek reimbursement for the placement of Ryan at Landmark School between December 30, 1993 and March 8, 1994." The court intended the March 30 order to be read in conjunction with the court's May 1, 1997 order in which the court afforded the parties four weeks "to submit proof of the value of the additional remedial services that Ryan would have received between December 30 and March 8 under the hearing officer's order." Stated differently, the court intended that judgment would be entered in the plaintiffs' favor on Count I (which sought reimbursement for the placement at Landmark School), but that the plaintiffs' recovery would be limited to the value of additional remedial services that Ryan would have received between December 30 and March 8 under the hearing officer's order. The court did not intend to award the plaintiffs full reimbursement for the placement at Landmark. To the extent the plaintiffs seek to amend the judgment to clarify the court's intent, the motion is granted and the court will direct that the judgment be modified.

To the extent, however, that the plaintiffs seek to present evidence of the value of additional remedial services, the court denies their motion. The plaintiffs did not provide this evidence in the time provided by the court and offer no reason for their not having done so. Accordingly, the court relied on the evidence submitted by the school defendants to calculate the award and will not amend the judgment in this respect.

Defendant Indiana Department of Education also seeks clarification from the court. The March 30 order ordered the "defendants" to pay the plaintiffs $1,017.61 plus costs; the

court should have made clear that the school defendants are to pay this award, not the Indiana Department of Education.

Accordingly, the court GRANTS the Department's motion to clarify the judgment (filed April 14, 1998 (# 114)) and GRANTS in part plaintiffs' motion to alter the judgment (filed April 8, 1998 (# 112)). The court MODIFIES page 3 of its March 30, 1998 order as follows: the court

> (3) DIRECTS the clerk to enter judgment for the plaintiffs on Count I, which seeks reimbursement for the placement of Ryan at Landmark School between December 30, 1993 and March 8, 1994, but limits the plaintiffs' recovery to the value of additional remedial services that Ryan would have received under the hearing officer's order as detailed in the court's May 1, 1997 order. In all other respects, judgment is entered in favor of the defendants. Only the school defendants submitted evidence regarding the value of services as directed by the court's May 1, 1997 order; the clerk shall enter judgment for the plaintiff and against the school defendants (Mishawaka-Penn-Harris-Madison Joint Services and the School City of Mishawaka) in the sum of $1,017.61 together with the costs of this action.

SO ORDERED.

ENTERED: April 21, 1998

s/ Robert L. Miller, Jr.
Robert L. Miller, Jr., Judge
United States District Court

## APPENDIX E — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA DATED APRIL 22, 1998

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF INDIANA**

Case No. 3:94CV268RLM

LINDA W., ERIK W., STEVEN V.D. on their own behalf and as next friends of Ryan V.D. a minor

PLAINTIFF

v.

KEVIN MCDOWELL, Indiana Department of Education (term 10/12/94) INDIANA DEPARTMENT OF EDUCATION CYNTHIA DEWES, Indiana Board of Special Education Appeals (term 10/12/94) RAYMOND QUIST, Board of Special Education Appeals (term 10/12/94) WILLIAM HENDRICKSON, Indiana Board of Special Education Appeals (term 10/12/94) INDIANA BOARD OF SPECIAL EDUCATION APPEALS (term 10/12/94) STELLA BATAGIANNIS, Board of Education of School City of Mishawaka (term 10/12/94) MISHAWAKA-PENN-HARRIS-MADISON JOINT SERVICES BOARD OF EDUCATION OF SCHOOL CITY OF MISHAWAKA

DEFENDANTS

AMENDED JUDGMENT IN A CIVIL CASE

* * *

*Appendix E*

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that JUDGMENT is entered for the plaintiffs on Count I, which seeks reimbursement for the placement of Ryan at Landmark School between December 30, 1993 and March 8, 1994, but limits the plaintiffs' recovery to the value of additional remedial services that Ryan would have received under the hearing officer's order as detailed in the court's May 1, 1997 order. In all other respects, judgment is entered in favor of the defendants. Only the school defendants submitted evidence regarding the value of services as directed by the court's May 1, 1997 order; the clerk shall enter judgment for the plaintiff and against the school defendants, Mishawaka-Penn-Harris-Madison Joint Services and the School City of Mishawaka in the sum of $1,017.61 together with the costs of this action.

**Equivalent Coupon Issue Yield:** 5.391

This document entered pursuant to Rules 79(A) and 58 of the Federal Rules of Civil Procedure on:

Dated: April 22, 1998

Stephen R. Ludwig, Clerk

By: s/ Sharon Macon
Deputy Clerk

## APPENDIX F — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION DATED AND ENTERED MARCH 30, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

No. 3:94-CV-268RM

LINDA W., et al.,

Plaintiffs,

vs.

INDIANA DEPARTMENT OF EDUCATION, et al.,

Defendants.

MEMORANDUM AND ORDER

The plaintiffs (Ryan, a minor child, and his parents) seek reconsideration of the court's May 1, 1997 order, which in large part granted the defendants' motion for summary judgment and mostly denied the plaintiffs' cross-motion for summary judgment. The plaintiffs contend that that order contained errors of fact and law and should be amended, pursuant to Federal Rule of Civil Procedure 59(a) and (e), to prevent a manifest injustice to the plaintiffs.

The defendants respond by asserting that the motion is premature because judgment has not been entered in this cause, arguing that a Rule 59 motion for reconsideration only

may be brought after the entry of judgment. Rule 59(e) appears to apply only to amendments of judgments, but Rule 59(a) is not so limited. Admittedly, Rule 59(a) does not provide explicitly for reconsideration of an order, rather than a judgment, but states, "On a motion for a new trial in an action tried without a jury, the court may open the judgment *if one has been entered*, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." Fed. R. Civ. P. 59(a). The italicized portion indicates that subsection (a) would apply even if judgment had not been entered. Thus, to the extent that the plaintiffs seek reconsideration under Rule 59(a), the court does not believe that the request is premature.

The plaintiffs contend that the court's order contains several errors of fact and law and details why they believe the court's decision was in error. A Rule 59 motion "is not appropriately used to advance arguments or theories that could and should have been made before the district court rendered a judgment, or to present evidence that was available earlier." *LB Credit Corporation v. Resolution Trust Corporation*, 49 F.3d 1263, 1267 (7th Cir.1995) (citations omitted). The court has reviewed the issues that the plaintiffs contend are incorrectly decided and concludes that the plaintiffs merely try to argue the merits anew, which is not a proper basis upon which to ask the court to reconsider its order. For instance, the plaintiffs urge the court to follow case law as established in *Murphysboro v. Illinois Bd. of Educ.*, 41 F.3d 1162 (7th Cir. 1994), but the summary judgment opinion specifically stated that Ryan's case is distinguishable from the facts as stated in *Murphysboro*. In

short, the plaintiffs' motion either renews previously raised arguments or raises arguments that should have been raised the first time around. Finding no basis to reconsider it previous decision, the court denies the plaintiffs' Rule 59 motion.

In sum, the court

(1) GRANTS the plaintiffs' leave to cite additional authority; the court considered this information in ruling on the Rule 59 motion (filed June 24, 1997 #101));

(2) DENIES the plaintiffs' motion to amend the summary judgment order (filed May 15, 1997 (#95));

(3) DIRECTS the clerk to enter judgment for the plaintiffs on Count I to the extent the plaintiffs seek reimbursement for the placement of Ryan at Landmark school between December 30, 1993 and March 8, 1994, but to enter judgment in favor of the defendants in all other respects. Only the defendants submitted evidence regarding the value of services as directed by the court's May 1, 1997 order; the clerk shall enter judgment for the plaintiff and against the defendants in the sum of $1,017.61 together with the costs of this action.

SO ORDERED.

ENTERED: March 30, 1998

s/ Robert L. Miller, Jr.
Robert L. Miller, Jr., Judge
United States District Court

## APPENDIX G — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA DATED MARCH 31, 1998

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF INDIANA**

Case No. 3:94CV268RLM

LINDA W., ERIK W., STEVEN V.D. on their own behalf and as next friends of Ryan V.D., a minor

PLAINTIFFS

v.

KEVIN MCDOWELL, Indiana Department of Education (term 10/12/94) INDIANA DEPARTMENT OF EDUCATION CYNTHIA DEWES, Indiana Board of Special Education Appeals (term 10/12/94) RAYMOND QUIST, Board of Special Education Appeals (term 10/12/94) WILLIAM HENDRICKSON, Indiana Board of Special Education Appeals (term 10/12/94) INDIANA BOARD OF SPECIAL EDUCATION APPEALS (term 10/12/94) STELLA BATAGIANNIS, Board of Education of School City of Mishawaka (term 10/12/94) MISHAWAKA-PENN-HARRIS-MADISON JOINT SERVICES BOARD OF EDUCATION OF SCHOOL CITY OF MISHAWAKA

DEFENDANTS

JUDGMENT IN A CIVIL CASE

* * *

*Appendix G*

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that JUDGMENT is entered for the plaintiffs on Count I, and in favor of the defendants in all other respects. Judgment for the plaintiff and against the defendants in the sum of $1,017.61 together with the costs of this action.

**Equivalent Coupon Issue Yield:** 5.391

This document entered pursuant to Rules 79(A) and 58 of the Federal Rules of Civil Procedure on:

Dated: March 31, 1998 Stephen R. Ludwig, Clerk

By: s/ Sharon Macon
Deputy Clerk

## APPENDIX H — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION DATED AND ENTERED MAY 1, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

No. 3:94-CV-268RM

LINDA W., ERIK W., STEVEN V.D., on their own behalf and as next friend of Ryan V.D., a minor,

Plaintiffs

vs.

INDIANA DEPARTMENT OF EDUCATION, et al.,

Defendants

MEMORANDUM AND ORDER

This cause is before the court on three motions for summary judgment: the plaintiffs' motion for summary judgment on Count I, the school defendants'[1] motion for summary judgment on both counts; and defendant Indiana Department of Education's motion for summary judgment on both counts.

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1. The school defendants comprise Mishawaka-Penn-Harris-Madison Joint Services and the Board of Education of the School City of Mishawaka.

*Appendix H*

The plaintiffs, Linda W., Steven V.D., and Eric W.,[2] bring this suit under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* contending that the individual education program developed to address their son Ryan V.D.'s dyslexia is legally inadequate. The plaintiffs seek review of several administrative decisions, and request compensation for their expenses incurred for Ryan's education and for attorneys' fees. Before bringing this suit, the parties engaged in an extensive administrative process, including two hearings and two appeals to the Indiana Board of Special Education Appeals ("BSEA"). Before turning to the substance of the cross motions for summary judgment, the court summarizes the events precipitating the administrative proceedings and the present suit.

Until the beginning of his sixth grade year, Ryan's parents sent him to a private Montessori Academy at their own expense. Ryan had difficulty with his school work as early as the second grade, and over the years, standardized tests indicated that Ryan's proficiency in reading and math was declining. By the start of his fourth grade year, Ryan's problems were severe. Upon recommendation of one of Ryan's Montessori teacher's, the parents requested in October 1989 that the school defendants evaluate Ryan and determine what services the school district could provide to address his problems. By December 1990, Ryan still was not evaluated by the school district, so in January, the parents obtained their own psychological evaluation. A case conference was convened in May 1990, and a committee

2. Ryan's natural parents, Linda W. and Steven V.D., are now divorced. Both Linda W. and Steven V.D. have remarried; Ryan's stepfather, Eric W., is a plaintiff, but his stepmother, Linda V.D., is not. The court refers to this collective group as Ryan's parents.

developed an individualized education program ("IEP") for Ryan to address his learning disability, noting that at that time his needs could be met in his current Montessori program with indirect learning disability support services. Ryan continued at the Montessori school with the parents placed him in the Mishawaka public schools in 1991 as Ryan began 6th grade.

Near the end of Ryan's 6th grade year (in 1992), the school district and parents met for the annual case conference. Standardized testing done in March 1992 indicated that Ryan scored very low in reading, language, and math, so the case conference committee concluded that Ryan should remain in the learning disability program. His 1992 IEP required that Ryan receive 60 to 90 minutes of direct services from the special education staff for the subjects of reading, language arts, and mathematics, but indicated that Ryan's special education resource services were not to exceed 24% of instruction time per week. The school operated under an "inclusion method" for dealing with those with learning disabilities, so Ryan was placed in substantive classes with non-disabled peers, but received direct support from a member of the learning disability staff who was present in the classroom along with the teacher responsible for the substantive subject matter. Ryan also was required to participate in a "Resource Room" to receive more direct services particular to his disability. Still, standardized testing revealed in early 1993 that Ryan continued to score at the bottom of the scale for reading, language, and math.

Ryan's 1993 case conference convened on April 19, and resulted in an IEP requiring more services, but directing that Ryan remain in the same learning disability program at the

school because the district felt that he was making some progress. During the case conference, Ryan's parents specifically requested that Ryan receive extended year services, but the committee concluded that he was ineligible. The parents dissented from the 1993 IEP and filed a written explanation of their concerns, asserting that Ryan needed more remedial reading instruction specifically addressing Ryan's decoding problems. The parents urged the school to develop an IEP that addressed why Ryan struggled with reading and that was geared toward best suiting Ryan's needs. Because of the parents' concerns that Ryan needed more remedial reading instruction, they placed him at Landmark School, a special education school in Massachusetts designed to meet Ryan's unique learning disability, for the summer of 1993. Near the end of the summer, Ryan's parents requested a due process hearing ("Level I hearing") challenging the proposed 1993 IEP; Ryan began 7th grade at the Mishawaka public schools under the 1992 IEP, which was in place because of the IDEA's "stay-put" provisions.[3] In addition, Ryan was receiving 90 minutes of language tutoring per week at his parents' expense.

Kristin Anderson conducted the Level I hearing, addressing whether the 1993 IEP identified and appropriately addressed Ryan's specific needs. Ms. Anderson issued her written findings of fact and conclusions of law on November 30, 1993. In general, she concluded that the school had not

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3. The act provides, "During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child . . . ." 20 U.S.C. § 1415(e)(3).

adhered to a specific "methodology" for addressing Ryan's reading problem; instead the school had enlisted a "hodge-podge" of intermittent strategies that were not adequately addressing Ryan's reading skills deficit. She concluded that the 1993 proposed IEP did not adequately provide for remediation of Ryan's reading problem, and ordered the school to provide Ryan with systematic and intense remedial reading instruction at three 45-minute sessions per week. She further ordered that the school district instruct Ryan on accommodation strategies at two 45-minute sessions per week. Ms. Anderson specifically concluded that the tutor who the parents had hired was providing the type of remediation services that the school should have been offering. Thus, the school was ordered to reimburse the parents for the tutoring that began during the fall semester of 1993. Because Ms. Anderson felt that there was no evidence that Ryan suffered from severe summer regression and attendant recoupment problems in the fall, she did not require the school district to provide extended year services, so the parents were not entitled to reimbursement for Ryan's summer schooling at Landmark. The hearing officer did conclude, however, that the school district's delay in evaluating Ryan when he initially requested services resulted in a loss of about one semester of special education services and directed that the school district provide remedial reading instruction during the summers of 1994 and 1995 as compensatory education. The hearing officer instructed the school district and the parents that any appeal had to be filed within 30 days and that her orders were to be implemented within the same 30 days, unless an appeal was filed.

Both sides appealed. The parents filed their appeal on December 30, indicating that they were challenging Ms.

*Appendix H*

Anderson's decision for factual errors and for providing inadequate relief. The school district requested, and received, an extension until January 31, 1994 to file its appeal, the parents were told in December that the school defendants intended to appeal, but that they had received an extension. Because of the decision to appeal, the school district did not implement Ms. Anderson's orders. On December 10, the parents applied, on Ryan's behalf, to the Landmark School he had previously attended; Ryan transferred to Landmark on January 10, 1994.

The BSEA held a Level II hearing on February 17, 1994 and issued its written decision on March 8, 1994. For the most part, the appeals board upheld Ms. Anderson's decision, although it amended some of Ms. Anderson's findings of fact and one conclusion of law. The parents asked that the appeals board address whether the parents were now entitled to reimbursement for placing Ryan at Landmark, but the board refused to hear the issue because it arose during the appeal's pendency, requiring the parents to participate in another Level I hearing to address reimbursement. Lon Woods was appointed to oversee the second Level I hearing, and by the parties' agreement, he addressed only whether the school district needed to reimburse the parents for placing Ryan at Landmark during the previous appeal's pendency. Mr. Woods denied the parents' request, concluding that the parents were not entitled to reimbursement because the parents had not shown that his then-current placement would cause "irreparable harm." Mr. Woods further concluded that the school district had shown that it had made attempts after Ryan started at Landmark to implement Ms. Anderson's orders, thus establishing that Ryan could have received an appropriate education had he remained within the district.

*Appendix H*

The parents also appealed Mr. Woods' decision to the BSEA, asserting that Mr. Woods applied an incorrect standard when he required the parents to show irreparable harm before they were entitled to remove Ryan from his placement and seek reimbursement. The appeals board concluded that Mr. Woods had applied the correct standard in determining whether the parents were entitled to reimbursement and held that Ryan would not have suffered irreparable harm had he remained in the Mishawaka public schools.

All parties to this action have moved for summary judgment.

> Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(e) "mandates entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which the party will bear the burden of proof at trial." "Where the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial . . . there can be no 'genuine issue of material fact,' since a complete failure of proof concerning

an essential element of the nonmoving party's case necessarily renders all other facts immaterial."

Although the moving party must initially identity the basis for its contention that no genuine issue of material fact exists, the nonmoving party cannot rest on his pleadings, but must produce his own evidence. Rule 56(e) requires that the nonmoving party who bears the burden of proof on an issue allege specific facts showing that there is a genuine issue for trial by his own affidavits or by the depositions, answers to interrogatories, and admissions on file.

In considering whether there are any genuine issues of material fact, we view the record and extract all reasonable inferences from the evidence in the light most favorable to the nonmoving party. However, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Where a fact is disputed, the nonmoving party must show that the disputed fact is material under the applicable law. The applicable law will dictate which facts are material. Only disputes that could affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.

*National Soffit & Escutcheons, Inc. v. Superior Sys., Inc.*, 98 F.3d 262, 264-265 (7th Cir. 1996) (citations omitted).

*Appendix H*

## I. SCHOOL DEFENDANTS

The IDEA, 20 U.S.C. § 1400 *et seq*, was designed to ensure that disabled children receive "a free appropriate public education." To that end, the act provides federal funding to states for educational programs for disabled children and establishes a system of procedural protections to ensure that parents, teachers, and local education agencies work together for children with disabilities. Among these procedural safeguards are the requirements that parents be notified of any proposed change in the child's identification, evaluation, or educational placement and that they be permitted to challenge any matter relating to the child's evaluation and education. 20 U.S.C. § 1415(b)(1)(C). Parents have the right to have their complaints considered in an impartial due process hearing, and may appeal the outcome to the state educational agency if the initial hearing is held at the local or regional level. 20 U.S.C. § 1415(b-c). Aggrieved parties have the further right to seek review in a federal district court, *see* 20 U.S.C. § 1415(e), as has been done here.

The Act provides that any court hearing an IDEA action "shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). The plaintiffs, within their motion for summary judgment, request that the court permit them "to present additional evidence on any issue raised . . . if deemed necessary by the court." The Seventh Circuit has stated that "[a] district court is not required to allow all evidence proffered by a plaintiff in an IDEA proceeding." *Monticello*

*School Dist. No. 25 v. George L.*, 102 F.2d 895, 901 (7th Cir. 1996). The plaintiffs do not specify what additional evidence would be presented at a hearing, or how it would bear on the court's review of the administrative record. Given that the issues that the plaintiffs present center on the parents' right to reimbursement, the court declines to hear additional evidence.

As stated above, the court is to grant such relief as it deems appropriate, so courts conduct an independent review of the administrative proceedings to determine appropriate relief. The district court's review, however, is not plenary; the Supreme Court has emphasized that § 1415(e)(2) should not be read as "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982). Indeed, district courts must give "due weight" to the administrative proceedings, and "adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Id.*; *see also Board of Educ. of Murphysboro v. Illinois State Bd. of Educ.*, 41 F.3d 1162, 1166-1167 (7th Cir. 1994).

As an initial matter, the court must satisfy itself that the procedures set forth in the IDEA have been met. The court's review of the administrative proceedings discloses that the state's administrative procedure was followed in Ryan's case. Although the plaintiffs take issue with the BSEA's granting the school defendants an extension to file an appeal from Ms. Anderson's order, granting the extension was not a

violation of the act's procedural requirements. Indeed, the BSEA's power to grant an extension is provided in 511 I.A.C. 7-15-6(j). Further, although the school defendants failure to implement Ms. Anderson's order within 30 days because they received an extension is pertinent to the parents' right to reimbursement, it does not implicate the impartiality of the process. Accordingly, the court is satisfied that the procedural requirements of the IDEA were substantially complied with during both Level I hearings and both Level II hearings.

In their brief in support of their summary judgment motion, the plaintiffs outline four substantive issues pertinent to this lawsuit: the first three relate to reimbursement of expenses the parents paid for Ryan's education (Count I of the plaintiffs' amended complaint) and the fourth relates to attorneys' fees in maintaining this action (Count II). Although the plaintiffs request that the court defer ruling on Count II until after ruling on Count I, the school defendants have moved for summary judgment on all counts of the complaint. Accordingly, the court addresses the school defendants' motion for summary judgment as to both counts of the amended complaint.

A. Reimbursement Issues

The parents seeks reimbursement for Ryan's 1993 summer school tuition. The parents assert that Ms. Anderson concluded that Ryan lost one semester of special education programming; thus, they should be compensated for the summer that Ryan spent at Landmark. Although Ms. Anderson directed the school to provide Ryan with compensatory services, the parents assert that such an award

is not reasonable because the hearing officer already had concluded that the school defendants' services were inadequate, and the receipt of still more inadequate services is not compensation. The court's independent review of the first Level I hearing lead it to conclude that the plaintiffs have extrapolated too much from Ms. Anderson's decision. The hearing officer made two separate findings: that the school district's initial delay in providing services resulted in a loss of services to Ryan, for which he was entitled to compensatory services from the school, and that, because there was no evidence that Ryan suffered severe summer regression, the school district was not obligated to provide him with summer schooling in 1993. The plaintiffs believe that these findings provided Ms. Anderson with "a wonderful opportunity" to order the school to pay for Ryan's 1993 summer schooling as compensation for its initial delay in evaluation. Certainly, the hearing officer could have so ordered, but she did not. She specifically concluded that there was no evidence of severe summer regression and attendant recoupment problems. Even though the court reviews all of the proceedings and evidence submitted, the court must give due weight to a conclusion, such as this, that education professionals are better able to judge.

Having so concluded, the hearing officer was correct to hold that the school defendants had no obligation to provide extended year services to Ryan in 1993. Thus, his parents' decision to send him to Landmark for the summer was their own and they must bear the fiscal responsibility for so doing. Further, the award of future compensatory services was not an award of "inadequate services" as argued by the plaintiffs. Ms. Anderson concluded that the proposed IEP was

inappropriate because the school district had not adhered to a specific methodology to remedy Ryan's dyslexia. She did not conclude that the school district was unable to provide Ryan with a "free appropriate education," only that it needed to adopt a consistent methodology to do so. Accordingly, the court agrees that a provision of future compensatory services as a remedy for the delay in initially providing services was appropriate.

The parents also seek reimbursement for their decision to place Ryan at Landmark during the pendency of the administrative proceedings. The Supreme Court has recognized that parents who disagree with a proposed IEP may unilaterally withdraw their child from the public school, place the child in private school, and still seek reimbursement for doing so. *School Comm. of Burlington v. Department of Educ. of Mass.*, 471 U.S. 359 (1985). To prevail, the parents must show both that the public school placement violated the IDEA and that the private school placement was appropriate under the act. *Id.* Thus, parents who choose to withdraw their child from a public placement during the pendency of administrative proceedings do so at their own risk. *Id.*

In an effort to define what constitutes an appropriate education, the Supreme Court has provided that,

> Insofar as a State is required to provide a handicapped child with a "free appropriate education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child

> to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

*Rowley*, 458 U.S. at 203.

The parents argue that because Ms. Anderson found that the school defendants were not providing Ryan a "free appropriate education," his placement at the public school was perforce inappropriate. Because the Landmark placement has proven to be appropriate, they claim entitlement to reimbursement for placing Ryan there during the pendency of the administrative proceedings. The school defendants respond that because both sides appealed Ms. Anderson's order, the court was not required to implement the ordered changes until the appeals process was completed. This may be so, but because the parents are seeking reimbursement the court must determine whether the placement was appropriate when the parents decided to withdraw Ryan. After reviewing the testimony presented during the administrative proceedings, the court agrees that at the time that the parents chose to withdraw Ryan, the school was not

providing an appropriate education to the extent that Ryan was not receiving systematic instruction in remedial reading and accommodation strategies, as directed by Ms. Anderson's order.

The court reviewed the testimony provided at the first Level I hearing, which included testimony from Ryan's teachers and school psychologist as well as Ryan's parents. Independent review leads the court to conclude that although the school was providing enough accommodation for Ryan to pass from grade to grade, the school was not specifically addressing his individual learning disability. Still, although the school may not have implemented the techniques that the parents believed were appropriate, the IDEA does not mandate that the school provided the methodology of the parents' choice. The court recognizes that the evidence reveals that Ryan was passing from grade to grade; the record leads the court to believe, however, that this was due more to his parents' substantial assistance and the school's accommodations. With each grade that Ryan progressed, his disability became more apparent and more difficult to overcome. Although the IDEA does not mandate that a school remedy completely a child's learning disability, the conclusion of the hearing officer, to which the court gives due weight, was that Ryan was receiving no remedial reading instruction. Accordingly, to the extent that Ryan's parents were paying an outside tutor to provide remedial reading services, Ryan was not receiving a free, appropriate education.

The school defendants argue that even if Ryan was not receiving a free, appropriate education when his parents

withdrew him, Landmark was not the least restrictive environment ("LRE") and thus does not satisfy the requirements of the IDEA. The court agrees that Landmark does not comply with the IDEA's mainstreaming preference, but the Seventh Circuit has held that the LRE requirement takes on less significance once the court concludes that other requirements of the IDEA have not been satisfied. *Murphysboro*, 41 F.3d at 1168. (The main streaming requirement "was not developed to promote integration with non-disabled peers at the expense of other IDEA educational requirements and is applicable only if the IEP meets IDEA minimums."). In *Murphysboro*, the court was presented with no other alternative than the private placement selected by the parents; the court had to choose between the public placement, which was proven to be inadequate, and the private placement. *Murphysboro*, 41 F.3d at 1168 (the court's task was limited to "whether that one available choice would provide an appropriate education for [the child]").

Ryan's case is distinguishable. At the time that Ryan's parents withdrew him, Ms. Anderson already had determined what services the school needed to provide to comply with the minimum requirements of the IDEA. Thus, implicit in Ms. Anderson's order is that if the school defendants implemented her directives, Ryan would be receiving a free appropriate education. The school was ordered to provide Ryan with three 45 minute sessions per week of intense, systematic remedial instruction and two 45 minute sessions per week of accommodation strategies to lessen parental involvement with Ryan's homework. The parents did not challenge the appropriateness of these directives when they appealed Ms. Anderson's decision.

*Appendix H*

Although the court concludes that the parents were entitled to seek an appropriate education for Ryan during the pendency of the administrative appeal, the plaintiffs carry the burden of establishing the appropriateness of the placement. In the usual case where parents seek reimbursement, the parents withdraw the child from the public placement at the beginning of the administrative proceedings. Ryan's parents withdrew him after the Level I hearing, but before the Level II hearing. The difference in the timing of the withdrawal is significant for reimbursement purposes, because at the time that Ryan's parents decided to withdraw him, they were aware of Ms. Anderson's order and what was needed for Ryan to be receiving an appropriate education. Indeed, the parents' expert Vivian Lies, who testified during the first Level I hearing, stated that Ryan "needed to be in a mainstream program at a level of his cognitive facility so that he would be educated with children at his intellectual level, but at the same time he would require significant remedial intervention to deal with the fact of his coding deficits . . . ." (Admin. R. 3200) In short, Ryan's parents received, in Ms. Anderson's order, exactly what they had asked for — a directive that Ryan remain in a mainstream program with remedial reading instruction, including accommodation strategies. Because the parents were aware, when they placed Ryan at Landmark, of what services were needed to ensure that Ryan received an appropriate education, the parents are only entitled to be reimbursed up to the value of the instructional sessions ordered by Ms. Anderson. *Burlington*, 417 U.S. at 370-371 ("Reimbursement merely requires the [defendants] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP.")

Thus, the proper remedy is to reimburse the parents for costs up to the amount they would have incurred had they sought private tutors to provide the instruction directed by Ms. Anderson when the school defendants failed to implement the orders within 30 days. *See* 20 U.S.C. § 1415(e)(2) (under the IDEA, the court "shall grant such relief as [it] determines is appropriate"); *Burlington*, 471 U.S. at 369 ("The ordinary meaning of these words confers broad discretion on the court"). Further, any reimbursement must be calculated at a rate that qualified personnel would normally and reasonably charge for the services that were ordered by Ms. Anderson.

Lastly, the parents can only recover the costs of the remedial sessions from December 30, 1993, the day by which the hearing officer ordered the school to implement her directives, until the time the school was prepared to offer remedial and accommodation strategies instruction. After the Board of Special Education Appeals issued its decision, the school defendants wrote the parents indicating their intent to implement fully Ms. Anderson's orders and offered to convene a case conference to develop an IEP for Ryan. The parents did not respond. The parents were entitled to seek a appropriate services for Ryan during the pendency of the administrative proceedings, but their right to reimbursement ceased when they refused to allow the school district to provide the ordered services. The school defendants offered to convene a case conference for Ryan on either March 7 or 8; accordingly, the parents' right to reimbursement ceased on March 8.

The plaintiffs also seek reimbursement for the 1996 independent evaluation of Ryan, arguing that the school

district failed to complete the evaluation as required by the IDEA. The school defendants argue that they could not evaluate him because Ryan was not enrolled in the school district. The Special Education section of the Indiana Administrative Code provides, "For each student enrolled in special education, a comprehensive, multidisciplinary team re-evaluation shall be conducted at least every thirty-six (36) calendar months or more frequently if conditions warrant . . ." 511 I.A.C. 7-10-3(o). Special education is defined as "specially designed instruction, provided at no cost to the parents, to meet the unique needs of a student identified as disabled in accordance with this article." 511 I.A.C. 7-3-46. The defendants assert that in August 1994, Ryan's mother, Linda W., indicated that she wished to re-enroll Ryan in the Mishawaka public school system. At that time, the principal advised her that she would need to provide proof of residency for Ryan and attend a pre-enrollment conference. On August 22, 1995, the school advised the plaintiffs' attorney that it was prepared to offer Ryan services if his parents chose to re-enroll him. Thus, the school defendants took the position that they had no duty to perform Ryan's 3-year evaluation because the parents gave no indication that they intended to re-enroll him.

The court agrees that the school district was not obligated to perform a 3-year evaluation because Ryan was not enrolled in the district. The Indiana Administrative Code requires that a child be enrolled in the school's special education program before the 3-year evaluation requirement is triggered. Further, although the Indiana Administrative Code 7-10-1 obligates the district (as required by the IDEA) to seek out students within the district who are in need of special

education services, no purpose would be served by requiring a school district that stands ready to continue to serve a student to perform a re-evaluation when the parents have made no attempts to re-enroll the child in the school district. Summary judgment in favor of the school defendants is warranted on this issue.

B. Attorneys' Fees

The plaintiffs also seek an award of attorneys' fees in Count II of their amended complaint. Section 1415(e)(4)(B) of the IDEA provides that, in any proceeding brought under the IDEA, "the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents . . . of a child or youth with a disability who is the prevailing party." To determine whether the plaintiffs qualify as a "prevailing party" under the IDEA, the court applies a three-part test developed by the Supreme Court in *Farrar v. Hobby*, 506 U.S. 103 (1992). *Monticello*, 102 F.3d at 907. Under that test, the court considers (i) the difference between the judgment recovered and the recovery sought, (ii) the significance of the legal issue on which the plaintiff prevailed, and (iii) the public purpose of the litigation, *i.e.*, whether the plaintiff's success "accomplished some public goal other than occupying the time and energy of counsel, court, and client." *Farrar v. Hobby*, 506 U.S. at 121-122.

The plaintiffs have only prevailed on one issue: that, to the extent that the school defendants were not providing systematic, remedial reading, Ryan was not receiving a free, appropriate education, so the parents are entitled to some reimbursement for the school defendants' failure to provide

these services within 30 days of the first order. Overall, however, the plaintiffs have not been successful. The plaintiffs have requested that the court order the school defendants to reimburse them for Ryan's 1993 summer school; that they be reimbursed for Ryan's placement at Landmark; and that the Landmark IEP be deemed appropriate. The plaintiffs were successful only up to a point; they achieved an order from Ms. Anderson directing that the school provide him with certain services. Within three months of that decision, the school district was prepared to offer the appropriate services, but the parents took the position that the school was unable to provide adequate services and that Landmark was the best placement for Ryan. Neither Ms. Anderson nor the court found that the school was unable to provide Ryan with an appropriate education. Their minor victory in achieving reimbursement for the time period from December 30, 1993 through March 8, 1994 is outweighed by the plaintiffs' failure to achieve what they sought — a directive that Landmark was the only placement for Ryan, thus obligating the school defendants to pay for his placement there.

Further, the significance of the hearing officer's order directing the school to provide Ryan with certain services is belied by the parents' failure to allow the school to provide the services at the conclusion of the first Level II hearing. They were less concerned with the school district's providing remedial instruction than with enrolling Ryan at Landmark. That concern may be understandable from a parental perspective, but a fee award must be evaluated in the context of the litigation. Further, the plaintiffs' success is best characterized as interim in that the school district failed to

provide appropriate services for the ten weeks between Ms. Anderson's order and the district's offer to convene a case conference to develop a complying IEP for Ryan. *See Hunger v. Leininger*, 15 F.3d 664, 670 (7th Cir. 1994) ("This discussion enables us to put the relief that [the child] obtained in the proper legal pigeonhole: interim relief for which attorney's fees may *not* be awarded."). Nor was any public purpose achieved by this protracted litigation. Although the securement of free, appropriate education for a child is precious — and, indeed, mandated by the IDEA — this case was more about the parents' desire to provide Ryan with the best education for his disability, rather than merely an appropriate one. In sum, the parents' victory was *de minimis* when viewed in the context of what was sought. *Hunger*, 15 F.3d at 670 (These are "tactical victories in what turns out to be a losing war. Such rulings do nor create a right to attorney's fees.").

## II. STATE DEFENDANT

The plaintiffs have also named the Indiana Department of Education ("Department") as a defendant in this matter. Although the Indiana Board of Special Education Appeals conducted the due process hearings, the Department performed certain logistical functions, including assigning and training the hearing officers. The Department argues that, because the plaintiffs have not alleged a systematic defect in the state's procedures for supplying services to disabled students, the Department, is not a proper party. The parents' main argument in response to the Department's motion is that at least one district court has apportioned legal fees recovered by plaintiffs among the state and local school

defendants. Because the plaintiffs in this case are not entitled to attorneys' fees, however, the Department is no longer a proper party to this action.

## III. CONCLUSION

The court GRANTS IN PART the plaintiff's motion for summary judgment (filed July 10, 1996 (#70-1)) on Count I, and GRANTS the defendants' motions for summary judgment on Count II (filed September 18, 1996 and September 27, 1996 (#78 and #81)). The court DENIES plaintiffs' motion to delay ruling on Count II and motion for a hearing to present additional evidence (both filed July 10, 1996 (#70-2 and #70-3)). The court GRANTS the school defendants' motion for leave to file an oversized brief (filed September 27, 1996 (#82)).

The court does not direct the entry of judgment at this time, however; the court affords the parties four weeks from the date of this order to submit proof of the value of the additional remedial services that Ryan would have received between December 30 and March 8 under the hearing officer's order.

SO ORDERED.

ENTERED: May 1, 1997

s/ Robert L. Miller, Jr.
Robert L. Miller, Jr., Judge
United States District Court

## APPENDIX I — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION DATED AND ENTERED MARCH 27, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

No. 3:94-CV-268RM

LINDA W., et al.,

*Plaintiff*

vs.

INDIANA DEPARTMENT OF EDUCATION, et al.,

*Defendant*

MEMORANDUM AND ORDER

This cause comes before the court on the motion of all the defendants[1] to either dismiss for want of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), or for summary judgment pursuant to Fed. R. Civ. P. 56. The plaintiffs have filed a motion to strike the defendants' opening brief, arguing that its exceeded the 25-page limit

1. Defendants Mishawaka-Penn-Harris-Madison Joint Services and Board of Education of School City of Mishawaka filed the motion and supporting briefs. The other remaining defendant, the Indiana Department of Education, has joined in the motion and all of its supporting briefs.

imposed by the local rules without first seeking leave of court. Since the brief otherwise complied with the local rules governing briefs in excess of 25 pages, and because the defendants filed a belated motion for leave, the court grants the defendants' belated motion for leave to file an oversize brief and denies the plaintiffs' motion to strike. For the reasons stated in this memorandum and order, the court denies the defendants' motion for either a dismissal or for summary judgment.

Linda W., Eric W. and Steven V.D. bring this suit under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (the "IDEA"), contending, among other things, that the individual education program provided for their son,[2] Ryan V.D., is legally inadequate. Ryan has dyslexia. The plaintiffs seek review of several administrative decisions, and request compensation for their expenses incurred for Ryan's education and for attorneys' fees. Before bringing this suit, the parties engaged in an extensive administrative process, including two hearings and two appeals to the Indiana Board of Special Education Appeals. In this motion, the defendants contend, apparently for the first time, that this suit should not have been brought, either in this court or in the administrative proceedings, against defendants Mishawaka-Penn-Harris-Madison Joint Services ("MPHM Joint Services") and the Board of Education of School City of Mishawaka ("Mishawaka School City"), since Ryan's "legal settlement," as Indiana law defines that term, is not

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2. Ryan's natural parents, Linda W. and Steven V.D., are now divorced. Both Linda W. and Steven V.D. have remarried; Ryan's stepfather, Eric W., is a plaintiff, but his stepmother, Linda V.D., is not.

within the confines of Mishawaka School City. Because this is so, the defendants claim: (1) the court lacks subject matter jurisdiction over the case; and/or (2) summary judgment is warranted.

The defendants' theory as to why the court should either dismiss the cause or award summary judgment relies solely upon the contention that the defendants owe no duty to Ryan under applicable Indiana law and therefore cannot be sued under the IDEA. Under the defendants' view of the facts, Ryan lives with his mother and stepfather 75% of the time, while living with his father only 25% of the time.[3] Ryan's mother and stepfather reside within the boundaries of the South Bend School Corporation, while his father lives within the boundaries of Mishawaka School City. The IDEA requires school corporations to provide for the education of only those children "residing within the jurisdiction of the local educational agency of the intermediate educational unit." 20 U.S.C. § 1414(a)(1)(A). Thus, the defendants claim that Ryan has sued the wrong party.

---

3. Since Ryan now attends a private school in Massachusetts, he lives with neither parent for a large portion of his time. Nevertheless, the parties agree that this is irrelevant, and instead focus on where Ryan had been living in the few years preceding this litigation. The plaintiffs contend that Ryan had to spend more time with his mother for remedial educational purposes in light of the inadequacy of the programs offered by the Mishawaka schools; for the reasons set forth in this memorandum, the court need not resolve the reasons why Ryan spent more time with his mother than with his father.

*Appendix 1*

*1. Motion to Dismiss*

Under Fed. R. Civ. P. 12(b)(1), the court may dismiss claims that fail to bring a claim within the subject matter jurisdiction of the federal courts. "The party asserting jurisdiction bears the burden of demonstrating that he has alleged a claim under federal law and that the claim is not frivolous." *Operative Plasterers & Cement Masons v. Benjamin*, 776 F. Supp. 1360, 1363 (N.D. Ind. 1991). The defendants contend that the court has no subject matter jurisdiction over this cause because the plaintiffs have sued the wrong school corporation; the defendants argue that since Ryan resides within the confines of the South Bend School Corporation, his suit should be brought against that school corporation instead of Mishawaka School City (or MPHM Joint Services).

The defendants' motion misses its mark. The plaintiffs brought this case under the authority of 20 U.S.C. § 1415(c) as a result of decisions made by the Indiana Board of Special Education Appeals, which in turn was reviewing the decisions of the independent hearing officers stemming from two hearings held under the authority of 20 U.S.C. § 1415(b). Thus, subject matter jurisdiction exists in this court under the authority of 20 U.S.C. § 1415(e)(2), which explicitly creates jurisdiction in the federal district court over a claim brought by "any party aggrieved by the findings and decision under [20 U.S.C. § 1415(c)]." The plaintiffs brought this claim under § 1415(e)(2) as "part[ies] aggrieved by the findings and decision[s]" under the administrative proceedings, and thus, regardless of whether Ryan's legal settlement is within the confines of Mishawaka School City,

the defendants have no valid objection to this court's subject matter jurisdiction. Accordingly, the motion for dismissal for lack of subject matter jurisdiction is denied.

*2. Motion for Summary Judgment*

Since the defendants contend that the plaintiffs have no colorable claim against them, their motion is more properly brought as a motion for summary judgment.

> A party seeking summary judgment must demonstrate that no genuine issue of fact exists for trial and that the movant is entitled to judgment as a matter of law. If that showing is made and the motion's opponent would bear the burden at trial on the matter that forms the basis of the motion, the opponent must come forth with evidence to show what facts are in actual dispute. A genuine factual issue exists only when there is sufficient evidence for a jury to return a verdict for the motion's opponent. Summary judgment should be granted if no reasonable jury could return a verdict for the motion's opponent.
>
> The parties cannot rest on mere allegations in the pleadings, or upon conclusory allegations in affidavits. The court must construe the facts as favorably to the non-moving party as the record will permit, and draw any permissible inferences from the materials before it in favor of the non-moving party, as long as the inferences are reasonable. The non-moving party must show that

> the disputed fact is material, or outcome-determinative, under applicable law.

*Conery v. Bath Assocs.*, 803 F. Supp. 1388, 1392-93 (N.D. Ind. 1992) (citations omitted).

The defendants' theory supporting their summary judgment motion is the same as that used to support the dismissal motion: that the plaintiffs have no claim against the defendants since Ryan's legal settlement is not within Mishawaka School City.[4] Even when accepting as true the defendants' own view of the facts, and thus assuming that Ryan lives with his father only 25% of the time, the defendants' theory does not support summary judgment.

The IDEA requires school corporations to provide for the education of only those children "residing within the jurisdiction of the local educational agency of the intermediate educational unit." 20 U.S.C. § 1414(a)(1)(A). The parties agree that the IDEA leaves the determination of a student's residency to state law. At first blush, Indiana appears to mirror the simple residency language of the IDEA, because IND. CODE § 20-1-6-14(a), which designates which school corporations will be responsible for the education of children covered under the IDEA, provides that "[t]he school

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4. As noted, the Indiana Department of Education did not file its own motion, but rather joined in the motion as brought by the other defendants. Since the Indiana Department of Education arguably would be a proper defendant regardless of whether the plaintiffs have properly sued the other defendants, this argument offers no basis for summary judgment for the Indiana Department of Education.

corporation *in which a child with a disability resides* is primarily responsible for providing the child with a disability with an appropriate special education program." (emphasis added). Since IND. CODE § 10-8.1-6.1-1(e) provides that "[f]or the purposes of calculating the amount of state distribution of money to any school corporation, a student is a resident of a school corporation if the student's legal settlement is in its attendance area," the parties appear to agree that the ultimate determination of where a student "resides" for purposes of the IDEA is governed in Indiana by where his "legal settlement" is.

IND. CODE § 20-8.1-6.1-1, which sets forth the applicable standards for determining a student's legal settlement, states in part:

> (a) The legal settlement of a student shall be governed by the following provisions:
>
> (1) If the student is under eighteen (18) years of age, or is over that age but is not emancipated, the legal settlement of the student is in the attendance area of the school corporation where the student's parents reside.
>
> (2) Where the student's mother and father, in a situation otherwise covered in subdivision (1), are divorced or separated, the legal settlement of the student is the

> school corporation whose attendance area contains the residence of the parent with whom the student is living, in the following situations:
>
> (A) Where no court order has been made establishing the custody of the student.
>
> (B) Where both parents have agreed on the parent or person with whom the student shall live.

Since this portion of the statute bases legal settlement on the residency of the parents, the statute defines the term as follows:

> (b) The words "residence", "resides", or other comparable language when used in this chapter with respect to legal settlement . . . means a permanent and principal habitation which a person uses for a home for a fixed or indefinite period, at which the person remains when not called elsewhere for work, studies, recreation, or other temporary or special purpose. These terms are not synonymous with legal domicile. Where a court order grants a person custody of a student, the residence of the student is where that person resides.

IND. CODE § 20-8.1-6.1-1(b).

The defendants contend that, based on this statute's application, "Ryan is not and was not a resident of the School City of Mishawaka since at least 1991 since his legal settlement, as that term is defined under Indiana law, is with his natural mother, Linda [W.]", but the defendants offer no analysis of the statute to support their conclusion. Analysis of the statute leads to another conclusion. The logical starting point in this analysis is subsection (a)(1): "If the student is under eighteen (18) years of age, or is over that age but is not emancipated, the legal settlement of the student is in the attendance area of the school corporation where the student's parents reside." If this provision stood alone, the necessary conclusion would be that Ryan's legal settlement is in both Mishawaka School City and South Bend School Corporation, since a parent resides in each of those two school corporations.

Subsection (a)(2) adds additional provisions with respect to situations where the student's parents are divorced: "Where the student's mother and father, in a situation otherwise covered in subdivision (1), are divorced or separated, the legal settlement of the student is the school corporation whose attendance area contains the residence of the parent with whom the student is living, in the following situations: (A) Where no court order has been made establishing the custody of the student. (B) Where both parents have agreed on the parent or person with whom the student shall live." Ryan's situation is "otherwise covered by subdivision (1)" since he is under 18 years of age, so his legal settlement would be with the parent with whom he "is living" in one of the two enumerated situations.[5] The defendants

5. The statute sets forth a third situation in which subsection (a)(2) would apply, but since it deals solely with abandonment of the student by a parent that had been granted custody, neither party argues it has any applicability here.

offer no analysis of Ryan's situation with respect to the statute, and offer no theory as to whether either of the enumerated situations apply in this case. Ryan's case does not fall within the first provision of "where no court order has been made establishing the custody of the student," since a court order has granted Ryan's natural parents joint custody. The plaintiffs contend that the second provision, "where both parents have agreed on the parent or person with whom the student shall live," applies since Ryan's natural parents have agreed that Ryan will (and does) live with his father, Steven V.D. This might have offered a quick end to the analysis, but the plaintiffs offered no evidentiary support for this contention.

The court is left with the conclusion that neither subsection (a)(2)(A) or (a)(2)(B) applies in Ryan's case, and the analysis thus returns to subsection (a)(1):[6] "the legal settlement of the student is in the attendance area of the school corporation where the student's parents reside." Although Ryan's parents are divorced and living separately, this subsection would appear to suggest that Ryan's legal settlement lies in both school corporations where his parents reside. Further, subsection (b), which defines the words "residence," and "resides," explicitly states that "where a court order grants a person custody of a student, the residence of the student is where that person resides." The court notes that, with the exception of subsections (a)(4) and (a)(6), which apply only if the student is still a minor but married and living with his spouse or if the student is emancipated, the student's residence is not an issue in determining where

6. The statute also contains several other subsections, (a)(3)-(a)(7), which do not apply to this case and warrant no discussion.

that student's legal settlement is located. Nevertheless, the clear implication of the language is that if a court grants a person custody of a student, the student is deemed to reside, or live, with that person. Ryan's parents have been granted joint custody of Ryan by a court order, so (unless further facts come to light) Ryan is deemed to be living with both parents (which indeed he is), and his legal settlement is located in the two school corporations in which his parents reside.

Although this may be an awkward reading of the statute, it is the only logical way to interpret the statute, which does not explicitly address a situation in which the student lives at the homes of two parents with joint custody.[7] Since the determination of legal settlement issues in Indiana is accomplished administratively, *see e.g.* IND. CODE §§ 20-8.1-5-5 and 20-8.1-6.1-10, little case law exists interpreting IND. CODE § 20-8.1-6.1-1, and the court has found no case law addressing these issues. The court has found, and the defendants have cited, no case in which the legal settlement issue turned on which parent was legally entitled to claim the student as a dependent for federal income tax purposes.

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7. The court's interpretation of the statute is also supported by the defendants' own view of the facts, because by all accounts Ryan lives with his father in Mishawaka at least 25% of the time. The statute could, but does not, deem a student to live with the parent with whom he lives the majority of the time. Absent such an explicit exception, however, the court considers its conclusion to be the most logical interpretation of the statute.

Therefore, the defendants have not carried their burden on summary judgment of demonstrating that they are "entitled to judgment as a matter of law." Fed. R. Civ. P. 56; *see also Conery v. Bath Assoc.*, 803 F. Supp. at 1392. Summary judgment is inappropriate since Ryan's legal settlement is, for the purposes of these proceedings, properly within the confines of Mishawaka School City.

*3. Conclusion*

Therefore, for the reasons stated in this memorandum and order, the court:

(1) DENIES the defendants' motion to dismiss (entry #39-1);

(2) DENIES the defendants' motion for summary judgment (entry #39-2);

(3) DENIES the plaintiffs' motion to strike the defendants' opening brief (entry #50); and

(4) GRANTS the defendants' motion to file an oversize brief (entry #59).

SO ORDERED.

ENTERED: March 27, 1996

s/ Robert L. Miller, Jr.
Robert L. Miller, Jr., Judge
United States District Court

## APPENDIX J — DECISION OF THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS DATED JULY 7, 1994

**INDIANA DEPARTMENT OF EDUCATION**

Dr. Suellen Reed, Superintendent
Room 229, State House • Indianapolis, IN 46204-2798 • 317/232-6665

MEMORANDUM

TO: Margie Best, for the Parent
Margaret Bannon Miller, for the School

FROM: Kevin C. McDowell, Legal Counsel

RE: Board of Special Education Appeals' Decision in the matter of Ryan Van Damme (735-94)

DATE: July 7, 1994

Enclosed herein is the final written decision of the Board of Special Education Appeals in the matter of Ryan Van Damme.

Pursuant to I.C. 4-21.5-5-5, any party aggrieved by the decision has thirty (30) calendar days from the date of the decision to seek judicial review in a civil court with jurisdiction.

Should you have any questions, please feel free to contact me at (317) 232-6676.

*Appendix J*

cc: Indiana Board of Special Education Appeals
Lon C. Woods, Esq., Independent Hearing Officer
Dr. Stella Batagianis, Superintendent
Dr. Pam Von Rahl, Director
Dorothy Hopko, Division of Special Education
Paul Ash, State Advisory Council
File 735-93

*Appendix J*

**INDIANA DEPARTMENT OF EDUCATION**

Dr. Suellen Reed, Superintendent
Room 229, State House • Indianapolis, IN 46204-2798 •
317/232-6665

Before the Indiana
Board of Special Education Appeals

Hearing No. 735-94

| | |
|---|---|
| Student: | Ryan Van Damme |
| Student's Parents: | Ms. Linda Waelchli<br>Mr. Steven Van Damme |
| Student's Representative: | Margie Best |
| School Corporation: | School City of Mishawaka |
| Special Education Entity: | Mishawaka-Penn-Harris-Madison Joint Services |
| School's Representative: | Margaret Bannon Miller, Esq. |
| Appeal Date: | July 7, 1994 |
| Independent Hearing Officer: | Lon C. Woods, Esq. |

*Appendix J*

BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS

Article 7 Hearing No. 735-94

*Procedural History*

On February 14, 1994, by facsimile transmission, Petitioner-Appellant initiated a due process hearing under 511 IAC 7-15-5 seeking reimbursement for a unilateral placement. Petitioner-Appellant had sought to raise the issue before this Board in another due process hearing (Article 7 Hearing No. 705-93), but was advised by this Board on February 17, 1994, that the issue could not be heard by the Board as it was not raised in the hearing below. This hearing request followed.

On February 15, 1994, an Independent Hearing Officer (IHO) was appointed under the provisions of 511 IAC 7-15-5 to consider the Petitioner-Appellant's request for reimbursement for a unilateral placement. The IHO conducted a prehearing conference by telephone on March 8, 1994, with counsel for the respective parties. The IHO's prehearing conference entry of March 17, 1994, states the issue as follows: Whether the petitioner is entitled to reimbursement by the local school corporation for the costs of placement of petitioner in a private special education facility during the pendency of the appeal of the previous Article 7 proceeding (Art. 7 Hearing No. 705-93). The IHO provided both parties with detailed notice of hearing rights and procedures.

Hearing was originally set for March 8, 1994, but was rescheduled for April 18, 1994, following receipt of a request

for an extension of time by Petitioner-Appellant. On March 3, 1994, the Respondent-Appellee School Corporation filed a Motion to Dismiss Article 7 Hearing No. 735-94 in that Petitioner-Appellant had initiated a complaint in the U.S. District Court, Northern District of Indiana, South Bend Division under Cause No. 3:94CVO268RM, wherein the same parties were involved and the issue of reimbursement for the unilateral placement was involved. The IHO, on April 8, 1994, granted the Motion and dismissed the hearing.

Petitioner-Appellant requested the IHO reconsider his dismissal order. On April 12, 1994, the IHO directed the parties to prepare and file written argument in support of their relative positions and to do so by April 18, 1994. On April 21, 1994, the IHO reinstated the proceedings and set the matter for hearing on April 27, 1994. The Respondent-Appellee requested an extension of time, which was denied on April 22, 1994, but reconsidered the denial and granted an extension of time. Hearing was rescheduled for May 19, 1994, at a time, date and place convenient to the parties.

On May 26, 1994, the IHO granted Petitioner-Appellant a three-day extension of the time within which to file a post-hearing brief. The parties agreed to an extension of time for the issuance of the written decision to and including May 31, 1994, but with the three-day extension, the timeline for issuance of the written decision was moved to June 3, 1994. The written decision was issued on June 8, 1994.

*The Written Decision From The Hearing*

The IHO found that Petitioner-Appellant is a 14-year-old student with a specific learning disability. He was at the time

of the hearing enrolled in the eighth grade at a private school in Massachusetts. Petitioner-Appellant began the academic year enrolled with Respondent-Appellee. He was enrolled in the private school at mid-year by his parents. Petitioner-Appellant had previously attended the private school for summer school.

The IHO noted that the IHO in Art. 7 Hearing No. 705-93 issued her decision on November 30, 1993, which, in part, ordered Petitioner-Appellant's individualized education program (IEP) include two hours of daily instruction by a resource teacher to assist him with his general eighth grade curriculum. An administrative appeal was filed by both parties. The Board generally upheld the IHO's decision. However, the issue of reimbursement for the unilateral placement at the private school was not raised as an issue during the first due process hearing. Petitioner-Appellant was enrolled in the private school on January 10, 1994, during the pendency of administrative review. The private school placement was unilateral. The private school developed an IEP for Petitioner-Appellant for the balance of the school year. Respondent-Appellee neither agreed to the private placement nor participated in the private school development of the IEP.

The private school IEP addresses a residential component. During the day, Petitioner-Appellant attended a general academic program for eighth grade students with tutorial assistance during the evening to strengthen and reinforce his independent study skills. Respondent-Appellee undertook to implement the original IHO's decision as amended by the Board in February and March of 1994. There was no finding

by the last IHO that implementation of the original IHO's decision would pose irreparable harm to Petitioner-Appellant had it been implemented.

The IHO concluded that the issue of reimbursement for a unilateral private school placement by the parents was properly before him. The IHO found that during the pendency of administrative hearings under Article 7, the student's current educational placement shall be maintained, unless the parties agree otherwise. The current educational placement for Petitioner-Appellant was the educational placement ordered by the IHO. The parties had not agreed to the private residential placement. The IHO found that Respondent-Appellee took appropriate and reasonable steps to implement the IHO's decision of November 30, 1993. He also found that Petitioner-Appellant did not prove that the current educational placement, as determined by the IHO in her decision of November 30, 1993, was inappropriate and posed irreparable harm to him if implemented. As a result of the foregoing, the IHO ruled that Petitioner-Appellant was not entitled to reimbursement for his private school placement.

*Petition for Review and Response*

Petitioner-Appellant, by facsimile transmission on June 15, 1994, requested review of the IHO's decision of June 8, 1994. In essence, Petitioner-Appellant asserted the IHO's Conclusions of Law as to the standards of proof to recover costs for a unilateral private school placement are in conflict with two decisions of the U.S. Supreme Court. The two referenced decisions are *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359, 105 S.Ct. 1996

(1985) and *Florence County Sch. Dist. Four v. Carter*, __ U.S. __, 114 S.Ct. 361 (1993). Petitioner-Appellant believes that at the time of the unilateral placement, there was no appropriate IEP developed by the Respondent-Appellee, and that the IHO's decision to the contrary essentially reverses the previous IHO's decision. Petitioner-Appellant also states that "irreparable harm" is not a burden of proof for the parents.

Petitioner-Appellant also asserts that the IHO violated his due process rights by dismissing the hearing and then offering to reinstate the hearing on the condition that the parents waive the right to a timely decision. The Petitioner-Appellant also asserts that the May 19, 1994, hearing date was not agreed to. He also alleges the IHO abused his discretion by permitting certain documents of Respondent-Appellee and excluding certain documents of Petitioner-Appellant; by not excluding or including documents exchanged within or beyond the five-day timeline; by failure to render a timely written decision; by not according due weight to Petitioner-Appellant's expert; and by not addressing the appropriateness of the IEP developed by the private school.

The Petitioner-Appellant also alleged generally some error in "Findings of Fact: #2, 4, 10, 11, 13, 14 and Conclusions of Law #2, 3, 4, 5." However, Petitioner-Appellant does not state with any specificity what errors or omissions have been made. 511 IAC 7-15-6(e)(3) requires specificity as to such objections. The written decision was reviewed in light of the specific objections raised by Petitioner-Appellant.

Respondent-Appellee responded timely, filing its Response with the Board on June 24, 1994. Respondent-Appellee

maintained that evidence and testimony supports the conclusion that it had met the *Burlington* and *Florence County* standards, that it had offered timely to implement the written decision of the IHO from the first hearing, that the first decision of the IHO was not substantially different from the program Petitioner-Appellant was receiving at the time, and that it was possible to implement the IHO's decision of November 30, 1993. Respondent-Appellee asserts it had attempted several times to arrange a case conference committee with Petitioner-Appellant's parents but have received no reply. Respondent-Appellee also stated that it was estopped from implementing the written decision of the IHO dated November 30, 1994, because administrative appeal was pending; nevertheless, there was never a showing that the school was incapable or unwilling to provide an appropriate program to Petitioner-Appellant.

Respondent-Appellee also asserts that the private school placement does not comply with the requirements of state and federal law, which requires that students with disabilities be educated to the maximum extent appropriate with peers who do not have disabilities. The private school serves only students with disabilities and, Respondent-Appellee claims, cannot provide an appropriate program. In addition, Respondent-Appellee asserts that a residential placement is appropriate only where it is shown that the student cannot receive an appropriate education in a public school setting. Respondent-Appellee also stated that the IHO did not violate due process procedures and that the May 19, 1994, date was an agreeable date with the parties; did not abuse his discretionary authority by refusing certain of Petitioner-Appellant's exhibits; did submit his written decision late,

but this was occasioned in part by Petitioner-Appellant's actions; and did address the issue as framed in his prehearing order and not objected to by either party.

Respondent-Appellee also asserts that it could not develop an IEP through a case conference committee meeting unless or until the parents of Petitioner-Appellant indicate they were choosing not to attend. Although Respondent- Appellee is not appealing the decision and Petitioner- Appellant has not raised this as an issue, the Board holds that this construction of 511 IAC 7-12-1(d)(3) by Respondent- Appellee is erroneous. A parent does not have to inform a public agency whether or not the parent will attend and participate as a member of the case conference committee. A pattern of conduct will indicate sufficiently whether or not a parent wishes to attend or not attend. Where a parent, as here, indicates the parent will not attend through the parent's conduct, there is nothing that prevents the public agency from conducting the case conference in the parent's absence. This clarification is provided in this portion of the written decision of the Board and is not intended as a Finding of Fact, Conclusion of Law, or Order in this matter.

Petitioner-Appellant, on July 5, 1994, filed by facsimile transmission to the Board, a Motion to Strike Respondent-Appellee's Response and a Motion for Oral Argument. The Motion to Strike generally indicates Petitioner-Appellant's disagreement with the Respondent-Appellee's arguments. Arguments are not evidence or testimony. The Motion to Strike is denied. The Motion for Oral Argument is also denied. The issue to be decided is a relatively narrow one. The parties have already argued the underlying issues before

this Board. In addition, whether or not oral argument will be provided is a matter of discretion with the Board. Oral argument is not a due process right.

The Board, pursuant to 511 IAC 7-15-6(k), elected to review the record without oral argument and without the presence of the parties. The parties were notified that the Board would conduct its review on July 7, 1994, in the conference room of the Indiana Department of Education, Room 225, State House. Notice was provided the parties in writing dated June 27, 1994.

## APPEAL

The Indiana Board of Special Education Appeals convened on July 7, 1994, at or about 11:50 a.m. to review the Petition for Review. The Board had reviewed the entire record, the Petition for Review, the Response thereto, and the two subsequent Motions by Petitioner-Appellant to strike the Respondent-Appellee's Response and for oral argument. Both Motions by Petitioner-Appellant are denied. The Board met with members Mr. William Hendrickson and Dr. Raymond Quist. The third member, Mrs. Cynthia Dewes, is out of the country and unavailable to review the instant matter.

After consideration of the record and all subsequent pleadings, the Board now makes the following combined Findings of Fact and Conclusions of Law.

*Appendix J*

*Combined Findings of Fact and Conclusions of Law*

1. As to the allegation that the IHO did not adhere to the U.S. Supreme Court decisions with respect to reimbursement to parents for unilateral placements, the Board finds that the IHO did apply the Supreme Court's determinations in this regard. The IHO in Art. 7 Hearing No. 705-93 did not find that the Petitioner-Appellant's placement was inappropriate nor did she find his entire IEP to be so deficient as to prevent an appropriate education. The Board upheld the original IHO's decision with some minor modifications. The Petitioner-Appellant was deriving educational benefit from the program offered by the Respondent-Appellee. The Petitioner-Appellee would not have suffered irreparable harm.

2. The IHO did not violate the rights of Petitioner-Appellant or his parents. The IHO has the authority under State law to dismiss an administrative hearing, subject to administrative review by this Board. Although it appears that the reinstatement of the cause may have been contingent upon the Petitioner-Appellant waiving the timelines for the conduct of the hearing and the rendering of the decision, the IHO clearly did not premise reinstatement on this contingency. Petitioner-Appellant refused to waive the timelines but the matter was reinstated nonetheless. The admissibility or rejection of documents is within the discretion of the IHO. Petitioner-Appellant has not shown how such discretion was abused. There is no evidence that the granting of the Respondent-Appellee's Motion for Extension of Time was designed to circumvent the so-called "Five-Day Rule" for the exchange of documents and witness

lists. While it is a fact the IHO did not render his decision on the date he indicated he would, the delay was occasioned in part by Petitioner-Appellant's untimely filing of his post-hearing brief and the delay in receipt of the transcript, which was not received until June 3, 1994. The delay was minor and justifiable, and does not constitute a denial of due process to any party. The issue before the hearing officer was clearly articulated in pre-hearing documentation. The IHO did not fail to decide a significant issue before him.

3. The IHO determined that the Respondent-Appellee school corporation had an appropriate program for the Petitioner-Appellee. Once the IHO determined this ultimate issue, it would have been inappropriate to determine whether the private school also offered an appropriate program. Petitioner-Appellant does not show the relevancy for such a determination. There is no showing that the IHO ignored the testimony of Petitioner-Appellant's expert.

4. The Board cannot discuss the general listing of Findings of Fact and Conclusions of Law to which Petitioner-Appellant asserts the IHO committed error, had incomplete facts, had significant omissions, or misunderstood some fact. Petitioner-Appellant does not state what parts of the Findings of Fact or Conclusions of Law such errors, omissions, or misunderstandings occurred, nor does Petitioner-Appellant assert what the Findings of Fact or Conclusions of Law should be. Indiana law requires that such objections be specific, and this portion of the Petitioner-Appellant's Petition for Review lacks specificity and precludes review. 511 IAC 7-15-6(k).

*Appendix J*

*Order*

1. In consideration of the above Combined Findings of Fact and Conclusions of Law, the Indiana Board of Special Education Appeals hereby upholds the decision of the Independent Hearing Officer denying reimbursement to Petitioner-Appellant and his parents for a unilateral private school placement.

2. All other Motions before the Board not specifically addressed above are hereby denied.

So ordered this 7th day of July, 1994.

s/ Raymond W. Quist
Raymond W. Quist, Ph.D., Chair
Board of Special Education Appeals

Appeal Notice

Any party aggrieved by the decision of the Indiana Board of Special Education Appeals may seek review from a civil court with jurisdiction within thirty (30) calendar days from the date of this written decision.

## APPENDIX K — DECISION OF HEARING OFFICER WOODS DATED JUNE 8, 1994

IN THE MATTER OF THE ARTICLE VII HEARING REGARDING:

RYAN VanDAMME, by his parents and next friends,

Petitioners,

and

SCHOOL CITY OF MISHAWAKA and MISHAWAKA-PENN-HARRIS-MADISON JOINT SERVICES,

Respondents.

### DECISION

*Preliminary Proceedings*

These proceedings were initiated by the request for hearing filed in behalf of Ryan VanDamme (hereinafter referred to as "VanDamme") by his parents. The hearing request was received by the Indiana Department of Education, Division of Special Education, on February 14, 1994. The respondents are the School City of Mishawaka and the Mishawaka-Penn-Harris-Madison Joint Services (both hereinafter referred to as "Mishawaka").

Appearing for VanDamme as legal counsel was Margie Best, attorney at law, Chicago, Illinois. Mishawaka was

represented by Margaret Bannon-Miller of the law firm of Bose, McKinney & Evans, Indianapolis, Indiana. A telephonic pre-hearing conference was conducted on March 8, 1994, during which the dispute to be resolved was formulated to be as follows:

> Whether the petitioner is entitled to reimbursement by the School City of Mishawaka for the costs of placement of the child in a private special education facility during the pendency of the appeal of the previous Article 7 proceeding.

As further explanation as to the genesis of this issue, the same parties were involved in a prior due process action, the same being Hearing No. 705-93. A decision was issued by an independent hearing officer on November 30, 1993. An appeal to the Indiana Board of Special Education Appeals was resolved by its decision on February 28, 1994.

A hearing was held on May 19, 1994, pursuant to notice to the parties dated April 25, 1994, at the Administration Offices of the School City of Mishawaka. In addition to counsel of record, present in behalf of petitioner were Steven VanDamme, father of Ryan; and Eric Waelchli and Linda Waelchli, stepfather and mother of Ryan, respectively. Linda VonRahl, Director of Special Education for Mishawaka-Penn-Harris-Madison Joint Services; and John Ferrettie attended in behalf of the School City of Mishawaka.

Immediately prior to commencing the hearing, a final prehearing conference was conducted during which the parties offered into the record their respective exhibits.

*Appendix K*

Mishawaka offered respondent's Exhibits 1, 2, 3, and 4, including numerous subparts, all of which were admitted into the record. Respondent's Exhibit 5 was admitted during the course of the hearing. Petitioners offered Exhibits A through AA, inclusive, including numerous subparts. Exhibits H through K, P through T, and W through Z, were excluded as *res judicata*. All remaining exhibits were admitted into the record. In addition, the parents requested that the hearing be conducted as a closed proceeding, and separation of witnesses was to be in effect. The parties requested and were allowed to submit legal briefs either at the hearing or subsequent thereto.

Oral testimony of Pamela VonRahl was presented on direct examination in behalf of Mishawaka. Testifying in behalf of VanDamme were Karl Pulkkinen of the Landmark School in Manchester, Massachusetts, by telephone conference call; and Linda Waelchli on direct and rebuttal. Due to scheduling and time commitments, testimony was allowed to be presented out of order.

*Summary of Evidence*

VanDamme is a 14-year-old Caucasian male, dob 10/8/79, whose present age grade placement is the 8th grade. He has in the past been determined to be learning disabled and has attended school both at the Landmark School in Massachusetts and in Mishawaka.

By virtue of an earlier request by VanDamme, a due process hearing was held in the fall of 1993. A decision was issued on November 30, 1993, and an appeal to the Indiana

*Appendix K*

Board of Special Education Appeals was concluded in February, 1994.

VanDamme began the 1993-94 school year in Mishawaka. At midyear, VanDamme was enrolled by his parents in a private school for learning disabled children (Landmark School) which he was attending at the time of the hearing. VanDamme had also previously attended summer school at Landmark at the parents' expense.

*Findings of Fact*

After consideration of the oral testimony, documentary evidence, oral arguments of counsel, and legal briefs, the undersigned hereby finds as follows:

1. VanDamme is a 14-year-old Caucasian male, dob 10/8/79, who has experienced learning difficulties.

2. An independent hearing officer issued a decision on November 30, 1993, in behalf of VanDamme, which included an order that his Individualized Education Program (IEP) include two hours of daily instruction by a resource teacher to assist VanDamme with his studies in a regular 8th grade curriculum.

3. The hearing officer's decision was appealed to the Indiana Board of Special Education Appeals which for the most part upheld the hearing officer's orders.

4. The issue of reimbursement to the parents by Mishawaka for the costs of VanDamme's placement in a

private special education school for the 1993-94 school year was not adjudicated or presented as an issue during the previous due process hearing.

5. In December, 1993, VanDamme's parents contacted the Landmark school by making an inquiry as to the possible enrollment of VanDamme for the balance of the 1993-94 school year.

6. VanDamme's parents elected to withdraw his attendance at Mishawaka and enroll him at the Landmark School in Manchester, Massachusetts, on January 10, 1994.

7. VanDamme's withdrawal from Mishawaka and enrollment at Landmark School was initiated without the consent of Mishawaka.

8. VanDamme's parents initiated contact with the Landmark School during the pendency of the appeal before the Indiana Board of Special Education Appeals.

9. VanDamme was enrolled at the Landmark School prior to the issuance of the decision of the Indiana Board of Special Education Appeals.

10. VanDamme's course of study and overall individualized Education Program was developed by the Landmark School on January 26, 1994, for the period of January, 1994, to June, 1994. Mishawaka was contacted, but did not participate in the Cast Conference meetings.

11. VanDamme is enrolled in the residential component of Landmark School where during the day he attends a

regular 8th grade academic program, and receives tutorial assistance during the evening to strengthen and reinforce his independent study skills which includes organizing and carrying out his various homework assignments.

12. The Landmark School believes VanDamme is benefitting from the structured study skills development approach, and will eventually be able to function in a less restrictive academic environment.

13. Mishawaka took steps to implement the hearing officer's order in February, 1994, and again in March. Mishawaka received no response to its letters from VanDamme's parents.

14. There is no evidence that VanDamme would have suffered irreparable harm had the hearing officer's order of November 30, 1993, been implemented.

*Conclusions of Law*

After consideration of the evidence, findings, and applicable rules of law, the undersigned hereby concludes as follows:

1. Issues of fact properly before and determined by a hearing officer during a previous administrative proceeding are *res judicata*, and those issues of fact not previously adjudicated are not so barred.

2. The issue of reimbursement to the parents by Mishawaka for the costs of VanDamme's placement at the

Landmark School for the period of January, 1994, and thereafter, was not adjudicated during the previous administrative proceeding, and is, therefore, a hearable issue in the present proceeding.

3. During the pendency of a due process hearing, 511 IAC 7-15-5(h) provides that a student's present educational placement shall remain intact unless the parties otherwise agree. VanDamme's most recent educational placement was that which had been ordered in the prior administrative proceeding.

4. A public agency, in this instance a public school corporation, has the burden of proof regarding the appropriateness of a proposed or refused action during a due process hearing. Mishawaka took appropriate and reasonable steps in an effort to implement the hearing officer's decision of November 30, 1994.

5. Entitlement to reimbursement by Mishawaka to the parents for expenses incurred by virtue of their unilateral decision to place VanDamme in a private educational facility requires evidence that the current placement is inappropriate and, therefore, could cause irreparable harm to the student.

Therefore, the undersigned concludes that Mishawaka has met its burden of proof regarding the appropriateness of an Individualized Educational Program for VanDamme by its efforts to implement the orders issued out of the prior administrative proceeding. The decision of VanDamme's parents to enroll him in a private special education facility appears to have been contemplated for a period of time, and

once made was solely their own and without the consent of Mishawaka. Further, the undersigned concludes that VanDamme has failed to show that irreparable harm would have resulted had he remained in Mishawaka. The relief sought by VanDamme for reimbursement of the costs of his placement in a private special education facility is hereby denied.

Due to the resolution of the issue as hereinabove stated, there are no specific orders to be issued in this case.

**All parties to this proceeding have the right to appeal this decision by petition for review with the Indiana Board of Special Education Appeals within thirty (30) calendar days from receipt of this decision.**

Date: June 8, 1994

s/ Lon C. Woods
Lon C. Woods
Independent Hearing Officer
55 Monument Circle, Suite 1000
Indianapolis, IN 46204
(317) 638-6500

Note: The issuance of this decision was made this date due to receipt of the transcript of record by the hearing officer on June 3, 1994.

## APPENDIX L — DECISION OF THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS DATED FEBRUARY 28, 1994

**INDIANA DEPARTMENT OF EDUCATION**

Dr. Suellen Reed, Superintendent
Room 229, State House • Indianapolis, IN 46204-2798 • 317/232-6610

MEMORANDUM

TO: Margie Best, for the Parents
Ivan Bodensteiner, for the Parents
Margaret Bannon Miller, for the School

FROM: Kevin C. McDowell, Legal Counsel

RE: Board of Special Education Appeals' Decision in the matter of Ryan Van Damme (705-93)

DATE: March 8, 1994

Enclosed herein is the final written decision of the Board of Special Education Appeals in the matter of Ryan Van Damme.

Pursuant to I.C. 4-21.5-5-5, any party aggrieved by the decision has thirty (30) calendar days from the date of the decision to seek judicial review in a civil court with jurisdiction.

Should you have any questions, please feel free to contact me at (317) 232-6676.

*Appendix L*

cc: Indiana Board of Special Education Appeals
Mr. and Mrs. Eric Waelchli
Mr. Steven Van Damme
Stella Batagiannis, Superintendent
Pam Von Rahl, Director of Special Education
Kristin Anderson, Esq., Independent Hearing Officer
Darcy Hopko, Division of Special Education
Paul Ash, State Advisory Council
File No. 705-93

*Appendix L*

**INDIANA DEPARTMENT OF EDUCATION**

Dr. Suellen Reed, Superintendent
Room 229, State House • Indianapolis, IN 46204-2798 •
317/232-6610

Before the Indiana
Board of Special Education Appeals

Hearing No. 705-93

| | |
|---|---|
| Student: | Ryan Van Damme |
| Student's Parents: | Steven Van Damme &<br>Linda & Eric Waelchli |
| Parent's Representative: | Margie Best, Esq. |
| School Corporation: | School City of Mishawaka |
| Special Education Entity: | Mishawaka-Penn-Harris<br>Madison Joint Services |
| School's Representative: | Margaret Bannon Miller, Esq. |
| Appeal Date: | February 17, 1994 |
| Independent Hearing Officer: | Kristin Anderson, J.D. |

*Appendix L*

Before the Indiana
Board of Special Education Appeals
Hearing No. 705-93

Background

A hearing was conducted by Independent Hearing Officer (IHO) Kristin L. Anderson, J.D. on September 26 and 27 and October 26, 1993. The hearing, requested by the student's parents (Petitioner), involved a 14-year-old, eighth-grade boy with a learning disability.

A complaint investigation initiated earlier by the Petitioner was underway at the time the due process hearing was requested. The IHO declined to include complaint issues in the hearing, but admitted the complaint investigation results into evidence. She abstained from intervening in a "stay-put" dispute between Petitioner and the school (Respondent) which concerned a schedule change for the student during the Fall 1993 term.

The following matters were defined as the hearing issues:

1. Whether the child's Individualized Education Program (I.E.P.) identified and appropriately addressed the child's specific needs; and if not, what program is appropriate for the child.

2. Whether the respondents violated the Indiana State Board of Education's provisions relating to "stay-put" and I.E.P. development; and

*Appendix L*

3. Whether the parents are entitled to reimbursement for remedial/compensatory services they obtained for the child.

The IHO identified 30 Findings of Fact (FOF) and 14 Conclusions of Law (COL), leading to eight (8) Orders, all numbered by reference to the three hearing issues. In general, they stated that:

The I.E.P. proposed by the school is inappropriate; the student is entitled to compensatory services; and the parents are entitled to reimbursement for certain evaluations obtained and remediations provided by the parents.

Appeal

The Board of Special Education Appeals met on February 17, 1994 in response to Petitions for Review filed by both parties. The Appeal was held at a time and place agreed upon by all parties, who were also advised of administrative appellate procedures. Both were represented by legal counsel and were allowed to present oral argument and rebuttal.

The student and his parents (Petitioner) filed a Petition for Review on December 30, 1993, received in the Indiana Department of Education (DOE) the same day. This Petition for Review alleged, in summary:

1. Inadequate relief — the parents requested reimbursement for remediations they provided, other than those specified by the IHO.

2. Factual errors — the parents objected to the IHO's statements that the parents desired a "superior" placement at a Montessori school in 1990; that the school did not violate "stay-put" provisions by making a schedule change in the 1992 I.E.P.; and that the parents did not object to the student's 1992-93 placement.

3. Continuing violations of due process procedures — the parents objected to an Extension of Time granted to Respondents by the Indiana Board of Special Education Appeals.

School City of Mishawaka and Mishawaka-Penn-Harris-Madison Joint Services (collectively, the Respondents) filed a joint Petition for Review and Response to Petitioner's Petition for Review on January 28, 1994, received by the DOE on that date. Respondents' Petition for Review and Response referred to the following specific FOFs, COLs, and Orders of the IHO:

FOF Fl.6: The Resource Room staff spends a substantial amount of the child's educational time in monitoring the child's classwork and homework. The child's family has consistently been spending an inordinate amount of time in implementing various accommodation strategies such as reading and outlining text material for the child's schoolwork.

FOF Fl.7: The child's grades reflect his capabilities and efforts and the substantial and extraordinary assistance of his parents and step-parents. (See TR 237, 331, 349).

*Appendix L*

FOF Fl.9: With proper instruction, the child could obtain the skills necessary to read independently at a reasonably fluent rate.

FOF Fl.10: The child needs to receive instruction both in the subject matter of his classes and in the process of reading itself in order to prepare him for even minimal self-sufficiency as an adult of normal intelligence.

FOF Fl.12: The child presently receives no instruction in "reading" per se. The "reading" class the child attended for 12 weeks in the Fall 1993 term was a general education class and did not relate to remediating his reading difficulties.

FOF Fl.13: Prior to the initiation of the due process hearing, this child's Resource Room experience has been largely that of a study hall for completing classwork and homework. (See TR 260, 261, 247). It has been also used for effecting such accommodation strategies as reading tests and for the completion of a general "life skills" worksheet not geared to the child's individual needs. When efforts have been made to address his reading difficulties, no single, systematic methodology has been used consistently over any significant period of time with the child. (See TR 212-13, 219).

FOF Fl.14: After the initiation of the due process hearing, the Respondents provided the child one-on-one assistance with his classwork and language skills. (TR 645-47). Even with this one-on one assistance, the Resource Room program for this child does not provide the intense, systematic, sequential, remedial reading instruction he needs

nor is it directly teaching the child learning strategies (such as highlighting or outlining) that he can use to cope independently with written material.

FOF F3.3: The Respondents did not hold a case conference meeting within 40 days of the parent's request and permission for evaluation. (Complaint 776-93, Conclusion of Law #2). As a direct result of the Respondents' failure to conduct a timely initial case conference meeting, the child lost one semester's special education programming.

COL Cl.3: The U.S. Supreme Court, in discussing what "minimal" benefits must be provided to handicapped children, notes that it was the intent of Congress that handicapped children reach a reasonable degree of self-sufficiency. *Hendrick Hudson District Board of Education v. Rowley*, 458 US 176 at 200, n. 23. While the Respondents' program is providing for adequate instruction in subject areas such as science, the proposed I.E.P. does not adequately address the child's severe reading deficits. After receiving four years of a hodge-podge of various interventions, accommodations and short-term or intermittent strategies, the child continues to have severe reading problems which cast doubt on the child's opportunity to have the minimal degree of personal independence intended by Congress. Although the proposed short-term objectives appear to be appropriate, it is doubtful that anything short of an intense, systematic, sequential presentation will be of significant benefit to the child.

COL Cl.5: The term "free appropriate education" means an education "at public expense and UNDER PUBLIC

SUPERVISION AND DIRECTION." 511 IAC 7-3-23, emphasis added. The child is not receiving a free appropriate education to the extent that the child's family has found it necessary to implement various accommodation strategies identified in the child's I.E.P.

COL C3.3: The Respondents' failure to convene a timely case conference for the child resulted in a loss of one semester of special education services for the child. The child is entitled to compensatory educational services for this loss of opportunity.

COL C3.8: The child's proposed I.E.P. which was to take effect in the fall of 1993 did not adequately provide for remediation of the child's severe reading deficits. The tutor retained at that time by the parents provided remediation services consistent with those being ordered in this hearing decision. The parents are entitled to reimbursement for the remedial tutoring which began at the beginning of the fall semester in 1993.

Order 01.1: The Respondents are ordered to provide the child with an intense, systematic, sequential remedial reading program in the methodology of their choice. These services are to be delivered in a minimum of three 45-minute sessions per week.

Order 01.2: The Respondents are ordered to implement all accommodations necessary to the child's inclusion classes. These include, but are not limited to reading or taping texts for the child. The Respondents shall further develop and implement a plan for teaching the child organizational

and study skills and accommodation strategies such as outlining and highlighting so that he will not be chronically dependent on staff and family for this assistance. These services shall be delivered in a minimum of two 45-minute sessions per week. The child's regular schoolwork shall be incorporated into this instruction whenever possible.

Order 01.5: The Respondents shall continue the remedial reading and independent learning skills training programs during the summers of 1994 and 1995 as compensatory education for the special education opportunity denied him as a result of their delay in testing and convening a case conference for him. Summer services are to be provided at the rate of 3 hours and 45 minutes per week for the number of weeks equivalent to one half semester each summer.

Respondents argued that the above FOFs, COLs, and Orders were in error because they were not based upon the evidence in the record. They argue:

1. The student's current program is appropriate to meet his needs;

2. Petitioners are not entitled to reimbursement and/or compensatory services with the exception of reimbursement for the testing obtained by the parents in 1990 based upon the School's failure to timely evaluate the student; and

3. Respondents did not violate the stay-put provisions of the State Board's rules (Article 7).

*Appendix L*

Petitioners filed a Response to Respondents' Petition for Review, received in the DOE and fax-dated 2:00 p.m., February 16, 1994. The Response basically reiterated the arguments contained in Petitioner's original Petition.

Motions and Objections

1. December 10, 1993 — Respondents filed Motion for Extension of Time in order to prepare a Petition for Review. This Motion was granted by Board on December 13, 1993.

2. December 30, 1993 — Petitioner filed Petition for Review and Motion to Reconsider Board's previous Order granting Extension of Time to Respondents. This Motion was denied by Board on January 3, 1994.

3. January 11, 1994 — Respondents filed Motion for Extension of Time in order to prepare a Reply to Petitioner's Petition for Review, and permission to file a joint Petition for Review and Reply to Petitioner's Petition for Review. These Motions were granted by the Board on January 12, 1994.

4. January 14, 1994 (fax-dated January 18, 1994) — Petitioner objected to Respondents' Motion for Extension of Time to file Reply. The Board viewed petitioner's objection as a Motion to Reconsider.

5. January 21, 1994 — Board again granted Respondents' Motion for Extension of Time to file joint Petition for Review and Reply. The Board reconsidered its Order of January 12, 1994, and amended it to grant an Extension of Time to and

including February 28, 1994 to conduct an appeal and render a decision.

6. January 28, 1994 — Respondents filed joint Petition for Review and Reply to Petitioner's Petition for Review.

7. February 3, 1994 (fax-dated February 4, 1994) — Petitioner filed Motion for an Extension of Time in order to respond to Respondents' joint Petition for Review and Reply;

The Motion also included an objection to the scheduled appeal hearing date, a matter which occurred due to an error in the DOE office and to which Petitioner withdrew this objection on February 7, 1994. Petitioner's representative was advised that attorneys not licensed to practice law in Indiana can nevertheless represent parties in these administrative proceedings.

8. February 8, 1994 — Respondents filed Reply to Petitioners' Motion for Extension of Time and Objection.

9. February 11, 1994 — Board Granted Petitioner's Motion for Extension of Time to and including 2:00 p.m. E.S.T. on February 16, 1994, to file a Reply.

10. Oral argument and rebuttal were provided by the parties to the Board on February 17, 1994.

*Appendix L*

**Decision**

By unanimous voice vote the Board made the following:

Joint Findings of Fact and Conclusions of Law

1. The Board of Special Education Appeals is the entity of the State duly empowered to review the Findings of Fact, Conclusions of Law, and Orders of Independent Hearing Officers appointed under the special education rules of the Indiana State Board of Education. The Board of Special Education Appeals has jurisdiction over the parties to this matter.

2. Any Finding of Fact which may be considered a Conclusion of Law shall be considered a Conclusion of Law. Any Conclusion of Law which may be considered a Finding of Fact shall be considered a Finding of Fact.

3. Evidence and testimony in the record support the decisions of the IHO, except as noted below.

4. The Board sustains Findings of Fact Nos. Fl.6, Fl.7, Fl.9 and Fl.10.

5. The Board amends Finding of Fact No. Fl.12 to read: "The child presently receives no instruction in 'reading' per se. The 'reading' class the child attended for 12 weeks in the fall 1993 term was a general education class."

6. The Board amends Finding of Fact No. Fl.13 to read: "Prior to the initiation of the due process hearing, this child's

Resource Room experience has been largely that of a study hall for completing classwork and homework. (See TR 260, 261, 247). It has been also used for effecting such accommodation strategies as reading tests and for the completion of a general 'life skills' worksheet not geared to the child's individual needs. (TR 272, 429)."

7. The Board amends Finding of Fact No. Fl.14 to read: "After the initiation of the due process hearing, the Respondents provided the child one-on-one assistance with his classwork and language skills (TR 645-47)."

8. The Board amends Conclusion of Law No. Cl.3 to read: "The U.S. Supreme Court, in discussing what 'minimal' benefits must be provided to children with disabilities, notes that it was the intent of Congress that children with disabilities reach a reasonable degree of self-sufficiency. *Hendrick Hudson District Board of Education v. Rowley*, 458 US 176 at 200, n. 23. While the Respondents' program is providing for adequate instruction in subject areas such as science, the proposed I.E.P. does not adequately address the child's severe reading deficits in order to attain reasonable self sufficiency."

9. The Board sustains Conclusions of Law Nos. Cl.5, C3.3. and C3.8.

10. The Board sustains Orders Nos. 01.1, 01. 2 and 01.5.

The Board refused a request by Petitioner to review a reimbursement issue which arose during the process of the Appeal and which was not raised at the hearing.

*Appendix L*

Any other matter raised before the Board and not directly addressed above is hereby deemed overruled.

Any party to this matter may seek judicial review of the Board's decision in a civil court with jurisdiction within thirty (30) days from the date of this written decision.

February 28, 1994

s/ Cynthia Dewes
Cynthia Dewes, Chair
Indiana Board of
Special Education Appeals

## APPENDIX M — DECISION OF HEARING OFFICER ANDERSON DATED NOVEMBER 30, 1993

HEARING DECISION: ARTICLE 7 / IDEA

Hearing No. 705-93

| | |
|---|---|
| Child's Name: | Ryan van Damme |
| Petitioners' Names: | Steven Van Damme,<br>Linda & Eric Waelchli,<br>parents |
| Petitioner's Representative: | Margie Best, Attorney<br>Ivan Bedensteiner, Attorney |
| Respondents: | School City of Mishawaka<br>Mishawaka-Penn-Harris-<br>Madison Joint Services |
| Respondents' Representative: | Marge Bannon Miller,<br>Attorney |
| Hearing Dates: | September 26 & 27, 1993<br>October 26, 1993 |
| Date of Decision: | November 30, 1993 |
| Hearing Officer: | Kristin L. Anderson, J.D. |

30 November 93
Date

s/ Kristin L. Anderson, J.D.
Kristin L. Anderson, J.D.

*Appendix M*

## HEARING DECISION: ARTICLE 7 / IDEA

State File No. 705-93

***CASE BACKGROUND*:**

This hearing involves a 14 year old child who is presently in 8th grade. Up until the beginning of 6th grade the child attended a Montessori school. Although the child had certain difficulties with his school work as early as the 2nd grade, various testing and evaluations did not clearly indicate a learning disability until the child was in the 4th grade. In the spring of his fourth grade year a case conference committee met and the child was classified as having a learning disability. He received consultation services at the Montessori school during the 5th grade and was transferred to public school in the 6th grade. School difficulties have persisted to the extent that the parent-petitioners dissented from the case conference committee recommendations of April 1993 and subsequently filed several complaints against the local education agency and special education joint service provider. Shortly thereafter, they filed for a due process hearing believing that the individual education program being proposed for the child did not adequately identify and program for the child's educational needs.

***PROCEDURAL CONCERNS*:**

The Division of Special Education received notice of the mother's complaints on June 3, 1993. The mother and father filed for a due process hearing on August 18, 1993. The investigation of the complainable matters was not stayed

during the pendency of the due process hearing at the request of the mother. Findings of fact, conclusions of law and orders were rendered on the complaints on September 3, 1993.

The hearing decision in this matter was due on October 2, 1993. At the request of the respondents, the decision deadline was extended to October 14, 1993 because of problems with witness availability. The hearing commenced on September 26th and testimony continued through the next day. At that time all parties agreed to extend the deadline to November 10, 1993 so that the rest of the witnesses could testify and the hearing could be completed in late October. The hearing reconvened October 26, 1993. At the close of the evidence, the petitioners requested that the decision deadline be extended to November 30, 1993 so that they would have an opportunity to review the hearing transcript and prepare a written closing argument or post-hearing brief. The respondents did not object and the petitioners' motion for extension was granted. The parties were ordered to have any written argument or briefs to the hearing officer on or before November 15, 1993.

Problems arose during the formulation of the hearing issues. Petitioners' desired to include certain complainable issues. The respondents objected to including these issues, stating that these issues were already the subject of a complaint investigation previously filed with the Division of Special Education. This hearing officer contacted Sharon Knoth of the complaint investigation team to verify the following: (1) if, in fact, complaints had been filed; (2) the nature of those complaints; and (3) the status of the investigation. Ms. Knoth informed this hearing officer that

complaints had been filed. She disclosed the specific complaint allegations against the respondents and stated that the only action that still needed to be taken was the typing of the report. The report was in fact filed on September 3, 1993. This officer declined, over petitioners' objection, to include any issue already determined by the Division for reasons of judicial economy, unfair surprise and res judicata principles. The petitioners were informed that the complaint investigation results could be admitted into evidence and that petitioners could present evidence of violations related to the hearing issues as framed.

A problem relating to the interpretation of Article 7 "stay put" provisions also arose prior to the hearing. The issue of "stay-put" violations was included in the hearing issues, but this hearing officer refused to rescind a change of the child's class schedule made by the respondents shortly after school opened for the Fall term. A request by the respondents to authorize this schedule change was also refused. This hearing officer abstained from intervening in the dispute over the schedule change because she determined that, absent unusual circumstances (which were not alleged here), such intervention with routine administrative decisions was not a proper function of a hearing officer.

At the hearing the following evidentiary concerns emerged and were decided by the hearing officer:

1. Petitioners' Exhibit 70 was rejected as evidence because it did not contain child-specific information.

2. Correspondence to the hearing officer, Petitioners' Exhibit 56, was made part of the record pursuant to

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Trial Rule 15 after portions relating to settlement negotiations were edited and it was stipulated that the respondents be allowed to supplement the exhibit with any missing correspondence.

***ISSUES*:**

The following matters were issues at the hearing:

1. Whether the child's I.E.P. identified and appropriately addressed the child's specific needs; and if not, what program is appropriate for the child.

2. Whether the respondents violated Article 7 provisions relating to "stay-put" and I.E.P. development; and

3. Whether the parents are entitled to reimbursement for remedial/compensatory services they obtained for the child.

***FINDINGS OF FACT*:**

The findings of fact set out in this decision have been made after considering all written evidence and oral testimony available. Great pains have been taken to reconcile the differences in the evidence whenever possible and reasonable to do so. Cites to the transcript or documentary evidence is for illustrative purposes only. Material cited may not be the sole basis for any particular finding of fact.

To the extent that any material included in a finding of fact is more properly categorized as a conclusion of law, it

shall be considered a conclusion of law. To the extent that any material included in a conclusion of law necessitates a finding of fact, it shall be considered to be an additional finding of fact.

F1.1 The child has **dyslexia**, a specific learning disorder which manifests itself in substantial problems in the decoding and encoding of language.

F1.2 The child is achieving average or above-average grades in classes and is passing from grade to grade.

F1.3 The child is experiencing no significant frustration or boredom as a result of the content level of his classes.

F1.4 The child is receiving adequate instruction in the subject matter of his classes through the use of various accommodation strategies in his classes and at home.

F1.5 The child receives, at present, approximately 16 hours per week in assistance from his family. This assistance takes the form of reading textbooks and course material to the child, outlining of his texts, as well as monitoring his homework and school lessons. (See TR 914, 917, 927, 970.)

F1.6 The Resource Room staff spends a substantial amount of the child's educational time in monitoring the child's classwork and **homework**. The child's family has consistently been spending an **inordinate** amount of time in implementing various accommodation

strategies such as reading and outlining text material for the child's **schoolwork**.

F1.7 The child's grades reflect his capabilities and efforts and the **substantial and extraordinary** assistance of his parents and step-parents. (See TR 237, 331, 337, 349.)

F1.8 Under every measure of discrete reading ability available to this hearing officer (statistical, percentile rank or grade equivalent), the child continues to have severe problems with the skills needed to read independently at a reasonably fluent rate.[1]

F1.9 With proper instruction, the child could obtain the skills necessary to read independently at a reasonably fluent rate.

F1.10 The child needs to receive instruction both in the subject matter of his classes and in the process of reading itself in order to prepare him for even **minimal** self-sufficiency as an adult of normal intelligence.

F1.11 The child needs direct, intense, sequential, systematic remediation in the following areas: word attack/ decoding, spelling/encoding, written expression, organization and other study skills, accommodation skills (such as highlighting and outlining), and word retrieval. (See TR 734, 853.)

---

1. Class grades are not discrete measures of reading ability. They reflect the sum total of the efforts of the child, his parents and the various accommodations made for the child's learning disability.

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F1.12 The child presently receives no instruction in "reading" per se. The "Reading" class the child attended for 12 weeks in the Fall 1993 term was a general education class and did not relate to remediating his reading difficulties.

F1.13 Prior to the initiation of the due process hearing, this child's Resource Room experience has been largely that of a study hall for completing classwork and homework. (See TR 260, 261, 247.) It has been also used for effecting such accommodation strategies as reading tests and for the completion of a general "life skills" worksheet not geared to the child's **individual** needs. (TR 272, 429). When efforts have been made to address his reading difficulties, no single, systematic methodology has been used consistently over any significant period of time with the child. (See TR 212-13, 219)

F1.14 After the initiation of the due process hearing, the respondents provided the child one-on-one assistance with his classwork and language skills. (TR 645-47). Even with this one-on-one assistance, the Resource Room program for this child does not provide the intense, systematic, sequential, remedial reading instruction he needs nor is it directly teaching the child learning strategies (such as highlighting or outlining) that he can use to cope independently with written material.

F1.15 The child is currently receiving 90 minutes per week private tutoring to remediate his severe reading

deficits (See TR 822, 975) The program being used, "Megawords", is one formerly used by the respondents and would meet the child's need for systematic, sequential reading remediation.

F2.1 The changes to the child's class schedule in early September 1993 did not involve any change of program content for the child.

F2.2 The April 1992 "stay-put" placement which classified the child's program as "Special Education resource (Less than 25%)" did not reflect the special education programming the child was receiving through his regular "Inclusion" classes.

F2.3 The petitioners were familiar with and did not object to the program placement the child actually received in the 1992-1993 school year.

F2.4 The program placement implemented for the child in the fall of 1993 while the child's due process hearing was pending provided the same level of services for the child as the child actually received during the prior year.

F3.1 The respondents failed to make a timely initial evaluation of the child in the fall of 1989. (Complaint 776-93, Conclusion of Law #2)

F3.2 The petitioners obtained appropriate evaluations at their own expense because of the respondents' failure to provide timely evaluation services.

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F3.3 The respondents did not hold a case conference meeting within 40 days of the parent's request and permission for evaluation. (Complaint 776-93, Conclusion of Law #2.) As a direct result of the respondents' failure to conduct a timely initial case conference meeting, the child lost one semester's special education programming.

F3.4 The petitioners obtained an independent evaluation by Vivian Liese in December 1992. There was no evidence that the petitioners made known to the respondents their desire for independent testing prior to their making the testing arrangements.

F3.5 At the time the independent testing was sought, the respondents were not delinquent in their duty to re-evaluate the child. There was no evidence that the petitioners had reasonable grounds to believe that the respondents could or would not complete the triennial re-evaluation in a timely fashion at the time Ms. Liese was retained to test the child.

F3.6 The respondents completed the child's triennial evaluation within the statutory time limit. (Complaint 776-93, Conclusion of Law #3)

F3.7 The respondents had an adequate public school placement available for the child at the time of his initial case conference committee meeting in April 1990 and the parents were aware that this placement was available.

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F3.8 The decision of the April 1990 case conference committee that the child's needs could **best** be serviced at the Montessori school was based on the perceived additional benefits to the child of a smaller class size, familiar teachers and peers and the mother's preference for the Montessori program. (TR 981, 982, 988, 500, 506, 155)

F3.9 The decision to place the child at the Montessori school was based on the parents' desire to provide a **superior** placement for the child. The decisions was made with the explicit understanding that such a placement would be at their expense, not that of the respondents.

F3.10 There was no evidence that the child suffered severe regressions during summer vacations nor that there were substantial recoupment problems during the fall.

F3.11 The private tutoring provided for the child prior to the fall of 1993 was not authorized under any of the child's I.E.P.s. At the time the services were provided, the parents were not disputing the adequacy of the then-current I.E.P. The private tutoring was an attempt by the parents to provide a superior educational program for their child.

***CONCLUSIONS OF LAW*:**

C1.1 The respondents' proposed program for the child in various subject areas such as "Science" or "Social Studies" is appropriate so long as the child continues

to get the level of support and assistance he has historically received **from both staff and family**. There is not sufficient information available for this hearing officer to decide whether the respondents' programming for such "content" areas would provide an appropriate educational opportunity for the child if implemented only by the school staff at its customary level of intensity.

C1.2 The respondents are not required to place the child in advanced level classes in order to provide him with an adequate program.

C1.3 The U.S. Supreme Court, in discussing what "minimal" benefits must be provided to handicapped children, notes that it was the intent of Congress that handicapped children reach a reasonable degree of self-sufficiency. *Hendrick Hudson District Board of Education v. Rowley*, 458 US 176 at 200, n. 23. While the respondents' program is providing for adequate instruction in subject areas such as science, the proposed I.E.P. does not adequately address the child's severe reading deficits. After receiving four years of a hodge-podge of various interventions, accommodations and short-term or intermittent strategies, the child continues to have severe reading problems which cast doubt on the child's opportunity to have the minimal degree of personal independence intended by Congress. Although the proposed short-term objectives appear to be appropriate, it is doubtful that anything short of an intense, systematic, sequential presentation will be of significant benefit to the child.

C1.4 The respondents are entitled to determine the methodology to be used in implementing an appropriate education program for the child. A "method" is defined to be a means or manner of procedure, especially a regular and systematic way of accomplishing something. "Methodology" denotes a system of principles, practice and procedures applied to any specific branch of knowledge. *The American Heritage Illustrated Encyclopedic Dictionary*, 1067 (1987). While a concept such as "teaching to the child's strengths" is perfectly acceptable as a principle, it does not, without more, pass muster as a "methodology", i.e., an applied system of practices or procedures.

C1.5 The term "free appropriate education" means an education "at public expense and **under public supervision and direction**". 511 IAC 7-3-23, emphasis added. The child is not receiving a free appropriate education to the extent that the child's family has found it necessary to implement various accommodation strategies identified in the child's I.E.P.

C2.1 The respondents did not violate 511 IAC 7-15-5(h) during the pendency of this due process hearing.

C3.1 The respondents were required to evaluate the child and convene a case conference committee meeting within 40 days of the parent's permission for evaluation. The respondents failed to do this and were in violation of 511 IAC 7-10-3. Complaint 776-93, Conclusion of Law #2.

C3.2 The petitioners are entitled to reimbursement for the funds expended by the petitioners in obtaining the initial evaluations for the child.

C3.3 The respondents' failure to convene a timely case conference for the child resulted in a loss of one semester of special education services for the child. The child is entitled to compensatory educational services for this loss of opportunity.

C3.4 The respondents' deadline for making its triennial re-evaluation of the child had not expired at the time the parents obtained the independent educational evaluation in December 1992. Complaint 776-93, Conclusion of Law #3. Neither had the parents requested that the respondents provide the child with an independent evaluation. For those reasons the respondents are under no obligation to reimburse the parents for that evaluation.

C3.5 The respondents were not obligated to provide what the case conference committee believed to be the best possible programming for the child in April 1990. Because they were willing and able to provide what was believed to be an adequate program, the parents are not entitled to reimbursement for Montessori school tuition which was incurred when the parents opted for what they considered a superior program for their child.

C3.6 Because there was no evidence of severe summer regression and attendant recoupment problems in the

fall, the respondents were and are not required to provide extended year services for the child. The parents are not entitled to reimbursement for the private summer school tuition or any other summer tutoring for the child on this basis.

C3.7 The parents consented to the I.E.P. developed in May 1992 which was the "stay-put" I.E.P. during this hearing. The parents are not entitled to reimbursement for services they obtained for the child that were not included in that I.E.P. nor for services obtained for that child because, in retrospect, it did not provide the type services deemed appropriate under this hearing decision. The parents are not entitled to reimbursement for the private summer school tuition or any other tutoring for the child on the basis of inadequacies of the "stay-put" or former I.E.P.'s approved by the parents.

C3.8 The child's proposed I.E.P. which was to take effect in the fall of 1993 did not adequately provide for remediation of the child's severe reading deficits. The tutor retained at that time by the parents provided remediation services consistent with those being ordered in this hearing decision. The parents are entitled to reimbursement for the remedial tutoring which began at the beginning of the fall semester in 1993.

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***ORDERS*:**

01.1 The respondents are ordered to provide the child with an intense, systematic, sequential remedial reading program in the methodology of their choice. These services are to be delivered in a minimum of three 45-minute sessions per week.

01.2 The respondents are ordered to implement all accommodations necessary to the child's inclusion classes. These include, but are not limited to reading or taping texts for the child. The respondents shall further develop and implement a plan for teaching the child organizational and study skills and accommodation strategies such as outlining and highlighting so that he will not be chronically dependent on staff and family for this assistance. These services shall be delivered in a minimum of two 45-minute sessions per week. The child's regular schoolwork shall be incorporated into this instruction whenever possible.

01.3 The child's homework shall be adapted to require minimal parental assistance.

01.4 The child shall be provided with a Franklin speller or similar device to assist him with his spelling. The respondents shall also provide the child a copy of each textbook that may be highlighted or marked in.

01.5 The respondents shall continue the remedial reading and independent learning skills training programs

during the summers of 1994 and 1995 as compensatory education for the special education opportunity denied him as a result of their delay in testing and convening a case conference for him. Summer services are to be provided at the rate of 3 hours and 45 minutes per week for the number of weeks equivalent to one half semester each summer.

01.6 The respondents shall submit a copy of their plan for complying with the above orders to the Division of Special Education for compliance monitoring.

03.1 The respondents shall reimburse the petitioners for the amounts they expended on the child's evaluations in January and March 1990.

03.2 The respondents shall reimburse the petitioners for the amount they have expended on tutoring services since the beginning of the 1993-1994 school years.

The specific orders set out above are to be implemented within thirty (30) calendar days from the date this decision is received unless, during that same time period, an appeal to the special education board of appeals is filed. Any appeal must follow the procedures set out in 511 IAC 7-15-6(e). A petition for appeal must:

1. be in writing;

2. be filed with the Division of Special Education and the opposing parties at the same time; and

3. specifically state the reasons for the objection to the hearing officer's decision, identifying those portions of the findings, conclusions and orders believed objectionable.

**SO ORDERED** this 30th day of November, 1993.

s/ Kristin L. Anderson, J.D.
Kristin L. Anderson, J.D.
Independent Hearing Officer

## APPENDIX N — CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

### 34 CFR 300.511

Sec. 300.511 Timeliness and convenience of hearings and review.

(a) The public agency shall ensure that not later than 45 days after the receipt of a request for a hearing —

* * *

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The SEA shall ensure that not later than 30 days after the receipt of a request for a review —

(1) A final decision is reached in the review and

* * *

### 34 CFR 300.511

Sec. 300.511 Attorneys' fees.

(a) In any action or proceeding brought under section 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

* * *

*Appendix N*

## 511 IAC 7-15-5

511 IAC 7-15-5 Due Process Hearings

* * *

(u) Any party involved shall have thirty (3) calendar days from the date the hearing officer's written decision is received to:

(1) implement the order in the hearing decision; or

(2) initiate an appeal as described in section 6 of this rule.

* * *

## 511 IAC 7-15-6

511 IAC 7-15-6 Due process hearing appeals

* * *

(e) A petition for an impartial review of the decision of a hearing officer by the state board of special education appeals may be initiated by any party to the hearing. The petition shall be:

(1) in writing;

(2) filed simultaneously with the division of special education and the opposing party;

(3) specific as to the reasons for the objections to the hearing officer's decision, identifying those portions of the findings, conclusions, and orders to which exceptions are taken; and

(4) filed withing thirty (30) calendar days of the date the hearing officer's decision is received by the party.

* * *

(j) Within thirty (30) calendar days of the receipt of a petition for review by the division of special education, the board of special education appeals shall conduct an impartial review, develop a written decision, and mail the written decision to all parties. Specific extensions of time may be requested by any party to the appeal and may be granted by the chair of the board. The chair shall respond in writing to all parties when a request for extension is made.

* * *

**20 U.S.C. § 1400**

20 U.S.C. § 1400 Congressional statements and declarations

This chapter may be cited as the "Individuals and Disabilities Education Act".

* * *

*Appendix N*

## 20 U.S.C. § 1401

20 U.S.C. § 1401

* * *

(8) Free appropriate public education

The term "free appropriate public education" means special education and related services that —

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(11) Individualized education program

The term "individualized education program" or "IEP'' means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title.